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PRACTICE REPORTS
IN THE
SUPREME COURT
AND
COURT OF APPEALS,
OF THE
STATE OF NEW YORK.

BY NATHAN HOWARD, JR.,
(COUNSELLOR-AT-LAW, NEW YORK.)

VOLUME XXXII.

ALBANY :
WILLIAM GOULD & SON,
LAW BOOKSELLERS AND PUBLISHERS.
1867.

Entered according to act of Congress, in the year eighteen hundred and sixty-seven,
By **WILLIAM GOULD & SON**,
In the Clerk's Office of the District Court of the Northern District of New York.

Rec July 10. 1867

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PRACTICE REPORTS.

SUPREME COURT.

FRANK LOBDELL and others, infants by FRANCIS BICKERSTAFF, their guardian, respondents agt. AMMON LOBDELL and others, appellants.

In an action for the *specific performance* of an agreement to convey land, the rule is not as strict now as formerly, in reference to the *proof* of the *exact agreement* alleged in the complaint.

If the allegations of the cause of action are not unproved in their entire scope and meaning ; and the variance is not material and no one has been misled ; and especially if no question of variance was raised at the trial, the objection taken on appeal that the agreement as set forth in the complaint is widely different from that found by the referee, will be disregarded.

In an action by *heirs at law* of an intestate son, claiming a specific performance of an oral agreement for the conveyance of land, against the *devisees* of the father, one of the defendants, a devisee, cannot be a witness on his own behalf to prove a conversation between the father and son, and in which the witness took part, respecting the agreement by the father to give the son a deed of the property, on the performance of certain conditions.

And it is not material whether the witness took part in the conversation or not. The broad objection is that he proposed by his evidence of the confessions or declarations of the deceased father of the plaintiffs (the son) to defeat their title as the heirs at law, and to establish his own title, he being a defendant. If the case does not come literally within the words of the statute (*Code*, § 399), "any transaction or communication had personally by such party with the deceased" father of the plaintiffs, it is within the intention of the statute.

It is a rule in equity that a specific performance of an agreement will not be decreed unless the agreement is founded upon a *sufficient consideration*. The plaintiff must make a meritorious case.

Held, in this case that assuming the facts as found by the referee, the case of the plaintiffs was meritorious, and they were entitled to the relief demanded : although there was much doubt whether the agreement as found by the referee was ever made. The case however was not destitute of equity. The evidence showed an intention on the part of the father to give the land to his son, when he (the father) should die ; and some of the evidence tended strongly to show that he had already given him the land.

Argued at Erie General Term May, 1866.

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Before GROVER, P. J., DANIELS, MARVIN and DAVIS, Justices, and decided Erie General Term September, 1866.

APPEAL from judgment entered on the report and decision of a referee. The facts sufficiently appear in the opinion of the court.

GEO. W. COTHRAN, *for plaintiffs.*

I. The facts found by the referee are fully sustained by the evidence.

The status of the parties as found was conceded :

That in 1846, Pliny Lobdell was seized of a farm of 57 37-100 acres of wild land in town of Hamburg, was admitted.

That pursuant to a verbal agreement between Pliny and Seymour, in 1846, Seymour entered into possession of the south fifteen acres of this farm.

That Seymour, in conjunction with Pliny, built a log house thereon, and in 1847, moved with his family into it, and finished it off while living in it.

That no part of it was cleared when Seymour moved on it.

That Seymour cleared it all up but about three acres.
And fenced it.

Reduced it to cultivation.

Raised crops on it.

Sold the wood, and logs and bark, and had the avails.

Built a framed barn.

Dug a well.

Planted fruit trees.

Built a framed house and moved in it in 1852, and lived therein until his death.

He and Pliny built line fence between the fifteen acres and rest of the farm.

He continued in possession from 1846 to May, 1864, when he died.

And paid the taxes thereon.

All this was done with Pliny's knowledge.

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He claimed the land as his own to Pliny himself.

As well as to other members of Pliny's family.

And to his neighbors.

He claimed that Pliny had promised him a deed of it. He told Pliny so. And also told his neighbors.

It was always spoken of in Pliny's family as Seymour's lot.

He frequently asked his father for a deed of it.

Pliny declined giving it, saying his word was as good as a deed.

Pliny told many of his neighbors that it was Seymour's land—that he had set it off for him as Seymour had worked hard for him, and showed Oliver Pierce the line clear through between the two parts of the lot.

That he intended to give him a deed of it. And after Seymour's death, he said to Pierce that "he meant to have deeded it to Seymour before he died, but did not."

Each of these facts is either conceded, or proved distinctly—nearly every one of them by defendants witnesses.

The only points seriously combatted by defendants' counsel in submitting the case to the referee, were as to the nature of the verbal agreement and the character of Seymour's possession under it.

The single question of fact to be determined here is what was the agreement? The nature of which will necessarily characterize Seymour's possession.

That the possession of Seymour and his acts in relation to the land were clearly in pursuance of and conformity to this agreement, within the rule, will scarcely be controverted. The referee's finding is explicit.

The testimony of Anna Lobdell, Seymour's widow and plaintiff's mother, fully sustains the referee, and would have warranted him in finding a contract of purchase and payment of consideration.

Seymour desired to go west, and by reason of the offer of this land, he was detained from going.

But independent of her testimony, the evidence of Nancy Lobdell Pliny's widow and Seymour's mother—notwith-

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standing the bitterness of her feelings towards Seymour's family, taken in connection with the repeated declarations of Pliny Lobdell, that these fifteen acres were Seymour's, and the persistent claims of ownership of the land made by Seymour to his father, to William Russel, as well as to his neighbors; his continued claims that Pliny had promised him a deed of it, and his oft repeated demand of his father for the deed, most clearly and decisively sustain the referee's finding.

No man possessed of a grain of sense would have so continuously and pertinaciously insisted that the land was his, that his father had promised him a deed of it, and follow it up with his requests for the deed, had there been no agreement that this land was Seymour's. Then add the acts and declarations of Pliny, and there can be no doubt of it.

A great variety of declarations of Seymour tending to show that he did not claim to own this land, were proved on the part of the defendants. By reference to the evidence, it will be seen that nearly all of these witnesses are relatives of the defendants, and some of them with impaired characters.

But the question as to whom to believe and whom to disbelieve, was purely a matter for the referee, and his decisions in that respect will not be disturbed (*Eschbaugh agt. Syracuse Distilling M. and B. Co.* 27 *How. Pr. R.* 125).

It is proper that I should here state that the finding of the referee, that subsequent to Seymour's death, Pliny ousted Seymour's family and took possession of this land, is a mistake. The plaintiffs have at all times been, and now are in possession of it. The finding is not of such a material fact as to vitiate his conclusions.

II. Part performance of a parol agreement for the conveyance of real property, will take the case out of the statute, and specific performance will be decreed. (*Williston agt. Williston*, 41 *Barb. S. C. R.* 635, 643; *McCray agt. McCray*, 30 *Barb. S. C. R.* 633; *Surcombe agt. Pinninger*, 17 *Eng. L. and Eq. R.* 212; *Traphagen agt. Traphagen*, 40 *Barb. S. C.*

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R. 537 ; 2 Story's Eq. Juris. § 761 ; Marphet agt. Jones, 1 Swanst. 181.)

The agreement in this case was that if Seymour would go on to and clear up, cultivate and improve these fifteen acres, Pliny would convey the same to him by deed.

This agreement was performed by Seymour, not only in part, but entirely. He expended not only his time, but his money in improving this land, with the knowledge of Pliny. There is no means by which his heirs can be adequately indemnified, save by compelling a conveyance to be executed. Not only would it be a hardship, but a fraud upon these children to permit these defendants to deprive them of this little patrimony left them by their father ; and it is their all of this world's goods. This case comes clearly within the rule laid down by Justice STORY, "that nothing is to be considered as a part performance, which does not put the party into a situation, which is a fraud upon him, unless the agreement is fully performed." (*2 Story's Eq. Juris. § 761 ; Malins agt. Brown, 4 Comst. R. 403.*)

To permit the defendants to interpose the statute here as a defense, would be to make it a statute to protect frauds, instead of a statute to prevent them.

III. There was a sufficient consideration to sustain this agreement. There was both a good consideration and a valuable one.

The grantee was the grantor's son, and the son whom the grantee has repeatedly informed his neighbors was the only one who remained home and worked for his father.

Then Seymour proposed to go west and purchase a farm, and to induce him not to go, Pliny agreed that if he would remain, and go on to and clear up, cultivate and improve these fifteen acres, the land should be his, and he would convey it to him by deed. Seymour agreed to it and fully performed the agreement.

The whole farm was wild lands. To procure these fifteen acres to be cleared up and improved, would enhance the value of the remaining portion, vastly more than the value of the whole as wild lands. In securing this, as well as a

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place to board his laboring men in clearing up the other part of the farm, Pliny received a valuable consideration amply sufficient to sustain the agreement.

Then there was the time and money expended by Seymour in improving the land.

IV. The variance between the allegations in the complaint and the proof as to the quantity of land, is not a material variance (*Code*, §§ 169, 170, 171).

There was no question as to this variance, raised at the trial. Had there been, it could have been corrected. It is not too late even now, if the court regards it of any importance (*Harris agt. Knickerbacker*, 5 *Wend.* 638).

The defendants not having taken the objection at the trial, it is waived. (*Pike agt. Evans*, 15 *J. R.* 210; *Shall agt. Lathrop*, 3 *Hill*, 237; *Lawrence agt. Baker*, 5 *Wend.* 301.)

The cases of *Harris agt. Knickerbacker* (*supra*) and *Philips agt. Thompson* (1 *Johns. Ch. R.* 131), were cases which arose under the former practice, when the rules relative to allowing amendments to pleadings, were more strict than under the Code. An examination of these cases show that they were both sustained, although reversed on particular grounds, so as to enable the court below to proceed in the manner directed by the court of review.

So to as to the counsel's objection that Seymour did not take possession of fifteen acres—that there is not fifteen acres within the fence. As to this objection, the referee held that there was no proof how much land was included within the fence, but that the agreement related to fifteen acres. This court ought not to interfere with the judgment on mere suggestion of counsel, unsupported by any evidence. It was the fault of the defendants that no proof was offered on this point—the plaintiffs being content to take the fifteen acres, even if the part fenced off contained more than that amount.

V. There is no error in the rulings of the referee in excluding the testimony offered at folios 147 and 151.

The plaintiffs are the heirs at law of Seymour Lobdell, deceased, and claim title to the *locus in quo*, as such heirs, immediately through Seymour. The witnesses offered are

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defendants, and defend as devisees of Pliny Lobdell, and as such claim the title to this land.

No matter about the peculiar phraseology of section 399 of the Code, its obvious meaning and intention are to prevent a party to an action, who claims title to the subject matter of the action, from testifying in his own behalf as against heirs at law, to any matter or thing which he learned or acquired personally from their ancestor. The section was intended to embrace, not only what the ancestor said personally to the witness, but what he said in the witnesses' presence—to close the mouth of a living party to all verbal information he may have acquired, in any manner, from the ancestor of the plaintiffs; to withhold from the living party the opportunity, as against the representatives of the deceased, to testify to that which, if the dead could arise and speak, they might controvert; to that which no living tongue can speak, save that of the living interested party.

Such was the view the learned referee took of the section; and I submit that he was correct.

The sole question of construction in *Simmons* agt. *Sisson* (26 N. Y. 264), was whether, under the Code prior to the amendment of 1862, a "conversation" was a "transaction." The court held it was not.

The case was tried before the amendment of 1862, and what Judge ROSEKRANS says in relation to the amended section has not the force of an adjudication which this court is bound to follow.

VI. Should the court be of the opinion that the evidence offered to be given by George Lobdell, as to the conversation heard by him was competent, it does not necessarily follow that a new trial must be granted.

The only point litigated was "about the terms upon which Seymour entered upon the land in question."

The defendants had already examined twelve witnesses on this point, and subsequently called three more, who, with George Lobdell, who testified generally, except as to this conversation, made sixteen witnesses. The plaintiffs called but *nine* in all.

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The rejected testimony was merely cumulative, and could, by no possibility have changed the result, especially as the referee decided the case in favor of the plaintiffs mainly on the testimony of Nancy Lobdell, the defendants' witness.

The well settled rule in courts of equity is that a new trial will not be granted on account of the reception of improper or the rejection of competent evidence, where it is plain to be seen that the result would have been the same had the improper evidence been rejected, or the competent evidence received.

When the result is satisfactory, courts of equity never reverse judgments on account of technical objections. (1 *Barb. Ch. Prac.* 459; *Baker agt. Ray*, 2 *Russel Ch. R.* 63, 66, 76-7; *Boote agt. Blundell*, 19 *Ves. Ch. R.* 503.)

Simmons agt. Sission (supra), was an action at law where technical rules are enforced.

It is confidently submitted that this is a proper case for the enforcement of the equity rule.

H. BOIES and P. G. PARKER, *for defendants.*

The complaint alleges that Pliny Lobdell, for a good and valuable consideration, paid by Seymour Lobdell, sold and by parol conveyed to said Seymour, certain premises particularly described therein containing about fourteen acres. That he delivered to Seymour the possession thereof, and agrees to execute to him a deed at any time on request.

The answer denies the agreements charged. The referee finds that Pliny being the owner of a wild lot, "made a verbal agreement with Seymour that if he, Seymour, would take possession of, clear up, reduce to cultivation and make improvements upon a part of said piece of wild land to be taken off the southerly end thereof, the said fifteen acres should become and be the property of him, the said Seymour, and that he, the said Pliny, would convey the same to him by a sufficient deed of conveyance for that purpose."

These agreements are widely different. The one declared

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on is a sale. The one proved an agreement to give the land if Seymour clears it up.

One is a sale of fourteen acres of land described by metes and bounds. The other an agreement to give fifteen acres. The one an agreement to execute a deed upon request. The other an agreement to execute it if Seymour would clear up and improve the land.

To entitle the plaintiffs to recover, they must prove the identical agreement set out in the complaint. (*Phillips agt. Thompson*, 1 *Johns. Ch.* 131; *Harris agt. Knickerbacker*, 5 *Wend.* 638-646; *Wilde agt. Fox*, 1 *Rand.* 165-170; *Byrne agt. Romaine*, 2 *Edw.* 445.)

In *Phillips agt. Thompson*, the rule is stated as follows: "To entitle the party to take the case out of the statute on the ground of part performance of the contract, he must make out by clear and satisfactory proof the existence of the contract as laid in his bill and the act of part performance must be of the identical contract set up by him. It is not enough that the act is evidence of some agreement, but it must be unequivocal and satisfactory evidence of the particular agreement charged in the bill."

In *Harris agt. Knickerbacker*, decided in the court of errors, the decree of the chancellor was reversed because the plaintiff had declared on a contract where the purchase money was payable in instalments, with interest, and proved a contract by which the purchase money did not draw interest.

II. To entitle the plaintiffs to a judgment under the agreement found by the referee, they must prove that Seymour performed the conditions upon which he was to have the land.

He certainly could not be entitled to land that he never possessed, and yet a part of the land which the judgment directs these defendants to convey he never did possess.

III. Can such an agreement as is found by the referee, be enforced by a court of equity, especially where the defendants offer to show that the plaintiffs suffer no pecu-

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niary loss by reason of the non-performance of the agreement?

In 4 *Kent's Commentaries*, 451, it is said: "The ground of this interference of chancery is fraud in resisting the completion of an agreement partly performed, and which part performance would work a fraud upon the party unless the agreement was carried into complete execution."

In *Harris agt. Knickerbocker* (5 *Wend.* 656), Senator OLIVER in delivering the opinion of the court says: "The specific execution of parol agreements is decreed in chancery for the purpose of preventing fraud, * * * the plaintiff should prove what the contract was in fact, and the extent of its execution, and what the injury and fraud consists in."

In *Phillips agt. Thompson* (1 *Johns. Ch.* 131), the chancellor says: "I agree with the wise and learned judges who have declared that the courts ought to take a stand against any encroachment upon the statute, and not to go one step beyond the rule and precedents already established."

I know of no reported case in which it is held that an agreement to give away real estate can be enforced by a court of equity, or that any other agreement to convey can be enforced unless a violation of that agreement would impose a pecuniary loss upon the party asking its performance.

IV. Another rule requires that an agreement to be enforced must be certain in its terms and mutual in its character (*Germon agt. Machin*, 6 *Paige*, 288).

In this case a promise to convey premises to a son in consideration of his supporting the parent, there being no agreement on his part to support the parent, it was held could not be enforced.

V. The referee erred in excluding the evidence of Ammon and George R. Lobdell, as to the arrangement under which Seymour took possession of the land in question.

The exceptions in section 399 of the Code, as amended in 1865, so far as they relate to this case, must read as follows:

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Provided however, that * * * a party to an action (shall not) be examined in his own behalf in respect to any transaction or communication had personally by said * * party with a deceased person, against parties who are the heirs at law of such deceased person, where they have acquired title to the cause of action immediately from said deceased person, or (against parties) who have been sued as such * * * heirs at law.

This provision, as I understand it, excludes the defendants from the right to testify to any transaction had personally with Seymour Lobdell and the plaintiffs from the right to testify to any transaction had between them and Pliny Lobdell, but it does not exclude either party from the right to testify as to transactions between Seymour and Pliny.

There is no stronger reason for rejecting the evidence of the defendants in this case than there is for excluding the evidence of all parties as to every transaction not within the personal knowledge of their adversaries.

Such a construction is not in accordance with either the spirit or the letter of the statute.

VI. Is it just that these defendants should be made to pay the costs of this trial? It seems to me, inasmuch as they have been able to defend successfully against the only claim of right which the plaintiffs ever made to them, and are beaten upon an agreement they never heard of until it appeared in the evidence upon the trial and the findings of the referee, that it is a little hard to compel them to pay the costs of this trial.

By the court, MARVIN, J. Action to compel specific performance of parol contract concerning land.

The plaintiffs allege in their complaint that in November, 1846, Pliny Lobdell, for a good and valuable consideration paid by Seymour Lobdell, sold, and by parol conveyed to Seymour Lobdell a certain piece of land, describing it. Seymour Lobdell entered into possession and made improvements. He died intestate in May, 1864. The plaintiffs are his heirs at law. He was the son of Pliny, who died in

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November, 1864, having devised the land in question to some of the defendants.

The referee found the agreement was "that if Seymour would take possession of, and clear up, reduce to cultivation and make improvements upon a part of said piece of wild land containing fifteen acres, to be taken off the southerly end of said lot, the fifteen acres should become and be the property of Seymour, and that he, Pliny, would convey the same to him by a sufficient deed for that purpose."

The whole tract of land owned by Pliny, the father, was some fifty-eight acres. The referee found that Seymour took possession of the fifteen acres under the agreement; that he built a log house aided by his father, and moved his family into it in the fall of 1847; he cleared all the land except about three acres and cultivated it. A line fence was built by him and his father between the fifteen acres and the residue of the land, and Pliny, the father, improved and occupied the residue. Seymour built a barn on the fifteen acres, and in 1852 a framed house. In short, the finding of facts by the referee shows that he fully performed on his part. He claimed to be the owner of the fifteen acres, and on several occasions requested his father to convey the land to him. His father refused, but frequently said he should give him a deed when he, Pliny, died.

The counsel for the appellants objects that the agreement as set forth in the complaint is widely different from that found by the referee; that the former was a sale and the latter an agreement to give the land, if Seymour cleared it up; and he claims that in this action there can be no recovery unless the identical agreement set out in the complaint is proved; and he cites several cases which were decided prior to the Code. I apprehend that the rule is not as strict now as it formerly was. This is not a case where the allegations of the cause of action were unproved in their entire scope and meaning; and the variance was not material. No one has been misled. If necessary, the complaint could have been amended, and may be even now. No question of

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variance was raised upon the trial (*See Code*, §§ 169, 170, 171, 173). The objection is untenable.

The defendant Ammon Lobdell, a son of Pliny, and one of the devisees of the land, was a witness for defendants. The defendants offered to prove by him a conversation as to the terms upon which Seymour entered upon the land in question held between Seymour and Pliny in presence of witness, and in which conversation the witness took part. Upon objection the evidence was excluded, and the defendants excepted. The plaintiffs claimed, as the heirs of Seymour, and the witness Ammon claimed as the devisee of his father, Pliny. By the Code (§ 399), a party to an action cannot be examined in his own behalf, in respect to any transaction or communication had personally by such party with a deceased person against parties who are executors, administrators, heirs at law, next of kin, or assignees of such deceased person, when they have acquired title to the cause of action immediately from said deceased person, and have been sued as such by the executors, administrators, heirs at law, next of kin or assignees.

The present action is by the heirs at law of Seymour Lobdell, and it is against the devisees of Pliny Lobdell. The devisee of the land is offered as a witness to prove a conversation between Pliny and Seymour, and in which he took part, for the purpose of defeating the title of the heirs of Seymour and establishing his own title. In my opinion the offered evidence was properly excluded.

The object of the evidence was to show by the declarations or confessions of Seymour Lobdell, facts tending to defeat the title of the plaintiffs, his heirs. The defendant, witness, participated in the conversation; but in my opinion, if he had taken no part in the conversation, he would not have been permitted to give evidence of the conversation of these deceased parties. This question is also in the case of George Lobdell, another defendant and devisee, who was a witness, and the offer was made to prove by him a conversation in his presence between Pliny and Seymour, about the terms upon which the latter entered upon the land in question. In

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this offer nothing is said of the witness taking part in the conversation. In my opinion it is not material whether the witness took part in the conversation or not. The broad objection is that he proposed by his evidence of the confessions or declarations of the deceased father of the plaintiffs, to defeat their title as the heirs at law, and to establish his own title, he being a defendant. It may perhaps be said that the case does not come "literally within the words of the statute"—any transaction or communication had personally by the witness with the deceased father of the plaintiff, but in my opinion it is within the intention of the statute. The mischief to be guarded against is obvious. We are referred to *Simmons* agt. *Sisson* (26 N. Y. R. 276), in which it was held that a conversation between the deceased and a third party, overheard by the defendant, might be proved by the defendant as a witness—that the hearing of such conversation was not "a transaction had personally between the deceased and the party" within the meaning of the Code. After the trial of that cause the Code was amended by inserting "or communication" after the word "transaction." In that case Justice ROSEKRANS took notice of the amendment of 1862, and remarked that "even as the section now stands, it does not prohibit a party testifying to a conversation between the deceased and a third person heard by the party, and in which he did not participate." This was *obiter*. In the case under consideration both the parties to the conversation are dead. The witness claims title under one of them, and the plaintiffs under the other, and against the party deceased, under whom the witness defendant claims.

It is objected that the agreement as found by the referee ought not to be decreed to be specifically performed. It is argued that it rested upon no sufficient consideration. It is undoubtedly a rule in equity that a specific performance of an agreement will not be decreed unless the agreement is founded upon a sufficient consideration. The plaintiffs must make a meritorious case. In this case, according to the findings of the referee, Pliny Lobdell, the father of Sey-

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mour, owned about fifty-eight acres of wild, uncultivated land, and he proposed to his son Seymour, who had recently been married, that he should go on to one end of the land and there clear it up, &c., &c., make improvements, and that he would convey to him fifteen acres off of that end of the land, or in the language of the referee "the fifteen acres should become and be his property, and he, Pliny, would convey it to him." Seymour performed. It was certainly an important undertaking on his part. The clearing up of the land and the erection of the necessary buildings, and it may be that Pliny derived a direct benefit in the enhanced value of his remaining land. He moved on to that a few years after and improved it. This case is much like *Williston* agt. *Williston* (41 Barb. S. C. R. 635).

Assuming the facts as found by the referee, I agree with him that the case of the plaintiffs is meritorious, and that they are entitled to the relief given them. Whether the agreement as found by the referee was ever made, I certainly have much doubt. I have read all the evidence with much care. The case was to turn upon the character of the possession of Seymour Lobdell, the father of the plaintiffs. Did he enter into possession in the character of a purchaser and occupy and improve the property as his own? Mrs. Lobdell, the mother of the plaintiffs, was a witness, and states that she was present when the agreement was made between her husband and his father. This was in 1846 or 1847. She says that Pliny told Seymour that he could have that fifteen acres of land for what he owed him; that is what Pliny owed Seymour, and to go on to it and take possession of it, and Seymour told him he would. In her cross-examination she stated that soon after they moved on to the place, she and her husband told Pliny that they wanted a deed, and he said he would not give them a deed until he died, because he wanted to give Seymour the whole fifty-five acres, and that he said this several times.

Joel S. Smith was a witness for the plaintiffs, and stated that he had a talk with Pliny two or three years previous to the trial. Witness inquired about Seymour's health, and

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remarked to Pliny that he ought to do pretty well by Seymour, as he had stood by him from a boy, and taking his health into consideration ; Pliny said he intended to ; that he had set him off fifteen acres of land as his own, and intended to do more at his death if he should not outlive the boy.

Houghton Clough was a witness, and proved that upon his application to Pliny for some whitewood logs, Pliny stated that Seymour had some to sell ; witness saw Seymour and bought some logs of him.

Alexander Petrie was a witness ; Pliny told this witness that Seymour was pressing him for a deed of the place, and that he did not incline to give him a deed at present ; that he considered his word good for that amount of land. This was all the evidence given in chief touching any agreement for a title to the land.

A large number of witnesses, some fifteen or more, were examined by the defendants ; a large portion of them were relatives, including Mrs. Pliny Lobdell. Their evidence tended strongly to show that Seymour did not enter upon the land and make the improvements under any agreement by which his father was to convey the land to him, but that the object of Pliny was to provide a home for Seymour (who was much out of health), and that he probably intended to give the fifteen acres to him when he, Pliny, should die.

The evidence shows that Seymour often claimed that his father was to give him a deed, and he often requested a deed ; Pliny denied that he was under any obligation to give him a deed, and always refused to do so. It would seem from the evidence of Mrs. Lobdell, the mother of Seymour, that there was at one time an understanding that Seymour should go on to the land (she speaks of fourteen acres) and his brother go on to the other portion (fourteen acres), and use, and improve and occupy the lands respectively, in a manner to please their father, and that they should have it when he died.

That Pliny was in debt to Seymour when he went on to the land, or at any time thereafter, is, I think, clearly disproved. He worked for his father a short time after he was

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of age, and by the testimony of the mother he was fully paid for this. It appears that he, Pliny, assisted Seymour about building the house, &c.

When the defendants rested, the plaintiffs called four or five additional witnesses, who testified to conversations with Pliny, mainly to the effect that he, Pliny, had given the fifteen acres to Seymour, or that he recognized the land as belonging to him, or that Seymour was to have the land, or that he had set it off to him. In short, I think the evidence shows an intention on the part of Pliny, that Seymour should have the land when he, Pliny, should die. Some of the evidence tends strongly to show that he had already given the land to Seymour. The case, however, must rest mainly on the evidence of the mother of the plaintiffs, and it must have been mainly upon her evidence that the referee found the agreement. The case is very peculiar. I am not prepared, upon the whole case, to dissent from the conclusion drawn by the referee from the testimony. The witnesses were before him. The case is not destitute of equity, and upon the whole, I think the judgment should be affirmed.

All the judges concurring, judgment affirmed.

SUPREME COURT.

THE PEOPLE *ex rel.* FRANCIS H. DUFF agt. SAMUEL BOOTH,
Mayor of the City of Brooklyn.

The comptroller of the city of Brooklyn has not exclusive power over the financial concerns of the city.

The mayor is vested with a discretionary check in respect to payments out of the city treasury; and it is his duty to take care that no money is drawn out of the treasury unless in pursuance of law.

Kings County Special Term July, 1866.

APPLICATION for a mandamus against the mayor of the city of Brooklyn, to oblige him to sign a warrant issued by the comptroller of the city to Francis H. Duff. The war-

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rant was claimed to be in payment to Duff of a balance of \$7,000 and upwards, claimed by him as surviving partner of John F. Barrett, deceased, who in his lifetime had a contract with the city for repairing the streets for the year 1864. Affidavits were read on behalf of the mayor, showing that the executor of Barrett claimed the money, and that the alleged partnership agreement was believed to be a forgery.

CROOKE & BERGEN, *for relator, cited city charter, section 13, title 3.*

JOHN G. SCHUMAKER, *corporation counsel, for the mayor.*

I. This proceeding is substantially directed at the city of Brooklyn and its treasury. The mayor is the nominal party only. It is simply "an attempt to collect a disputed claim, for which object the writ was never designed" (*People agt. Thompson, 25 Barb. 73*).

The affidavits show that Duff is not entitled to the money, and that there is another claimant who has sued the city for the money. The relator not having a "clear legal right," is not entitled to the writ. (*People agt. Sup. of Chenango, 11 N. Y. p. 563; Same agt. Ramson, 2 N. Y. p. 409.*)

II. There being a strong flavor of fraud about the claim, the mayor properly refused to sign the warrant. It was his duty so to do (*The People ex rel. Green agt. Wood, 35 Barb. 653, §§ 11 and 15, title 3, City Charter*).

GILBERT, J. Upon the evidence disclosed by the affidavits it is at least doubtful whether the relator is entitled to the moneys for which the warrant was drawn, and I am constrained to say that I can find nothing in the papers before me which make it the duty of the comptroller to draw the warrant in favor of the relator. The contract was with Barrett. He is dead. *Prima facie*, his legal representatives are entitled to the money due from the city. The relator claims that he was a partner, and produces a certificate to that effect, alleged to have been signed by Barrett. This is denied by disputing the genuineness of the signature of

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Barrett to the certificate and other facts. It further appears that the executor of Barrett has sued the city to recover the money for which the comptroller drew the warrant in favor of the relator. I can find nothing in the charter of the city or in the general statutes of the state authorizing the comptroller to adjudicate the question of the title to the money; and it is very clear that a statute making such a determination binding on the representatives of Barrett would be void. The action of the street commissioner related only to the doing of the work, and that of the auditor related only to the legality of the employment, and the amount of the bills. Their certificates had no effect upon the right to receive the money.

The question then is whether the mayor was concluded by the action of the comptroller and bound to sign the warrant as a mere ministerial act. I think not. The argument of the counsel for the relator would be applicable if the question related only to the amount, because in that case the mayor would be bound by the determination of the officers to whom the statute had confided that specific power on that subject. But the power of determining a litigated claim against the city has not been vested in the comptroller or any other city officer to the exclusion of the mayor. The provision of the charter is that no money shall be drawn or paid out of the treasury except upon warrants signed by the mayor or acting mayor and comptroller, and countersigned by the clerk.

It is contended that the power conferred upon the comptroller to manage the financial concerns of the corporation, and administer oaths to persons prosecuting claims against it, is exclusive in its nature, and that the mayor is vested with no discretionary check in respect to payments out of the city treasury, but is under a legal obligation to sign every warrant which has the signature of the comptroller. I cannot assent to this. On the contrary, I think the mayor has the power, and that it is his duty to take care that no money is drawn out of the treasury unless in pursuance of law.

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In the present case the appropriate remedy is by action against the corporation. The mayor, I think, had the power, and properly exercised it in refusing to sign the warrant in question. But if I am wrong on this point, it does not follow that the relator is entitled to the writ of mandamus. The granting or refusing the writ is a matter of discretion, and, under the facts of this case, I think it ought to be refused. For as was said by Judge EMMOTT in *The People agt. The Contracting Board* (27 N. Y. R. 381), to entitle a party to this remedy "there must be a clear legal right, not merely to a decision in respect to the thing sought, but to the thing itself."

The writ is refused; the order to be settled on one day's notice.

COURT OF APPEALS.

IN THE MATTER of the petition of MORTIMER LIVINGSTON and HENRY W. LIVINGSTON, infants, by JOHN LIVINGSTON, their guardian, for the removal of DANIEL C. BIRDSALL, from the office of trustee under the trust deed of WILLIAM WINTER.

1. As against the creator of a trust, under a trust deed securing to the grantor the rents, issues and profits of real estate during life, with remainder over, the court will not interfere in behalf of the remainder-men, to give them more than is secured to them by the very terms of the settlement.
2. Those claiming in remainder under such a trust deed, are interested in the management of the trust estate, and may prevent waste, calculated to injure or destroy the estate in remainder; but the creator of the trust is the only person who is interested in the *execution* of the *express trusts* therein mentioned.
3. The statute does not authorize a proceeding *by petition*, at the instance of those entitled in remainder, to remove a trustee of an *express trust* to receive the rents and profits of lands, and apply them to the use of any person, during the life of such person.
4. The statute authorizing any person interested in the execution of express trusts, to apply for the removal of a trustee on petition, was only intended to embrace that class of persons who are immediately interested, and who might be injured by a violation of the trust, or by the insolvency or other incompetency of the trustee.
5. It was erroneous in the court below to entertain a petition for the removal of a trustee, except upon the application of the creator of the trust.

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6. Where the evidence tended to show that a deed of trust was obtained by fraud and undue influence, from a person of weak or unsound mind, it was the duty of the court below to dismiss the petition for the removal of the trustee, unless the judge was fully satisfied that the trust deed was the voluntary act of a sane man.
7. Assuming, however, that the grantor was competent to create the trust, and that the deed is valid, the court ought not to remove the trustee against the wishes of the creator of the trust.
8. An order made upon motion in a special proceeding, is not a proper subject for a rehearing.
9. It is questionable whether a rehearing upon the merits, in a special proceeding, can be granted since the Code of Procedure, except upon an appeal to the general term.
10. The power to grant a rehearing cannot be arbitrarily exercised ; and if the judge grants it upon insufficient grounds, it is an error which the appellate court will correct.
11. The practice of one judge rehearing a matter decided by another judge *adverted* upon and condemned, and held—that it should be prohibited by positive enactment.
12. A settlement made by the guardian of infants, which is clearly just and advantageous to the infants, is binding upon them, and a court of equity will enforce it, if clearly made for their benefit.
13. The practice of amending and ante-dating orders, in a peculiar case, discussed and condemned, and the facts set forth.
14. Where it was evident that an order removing a trustee was not published by the justice until a certain date (*April 12th, 1865*), held, that such order could not take effect prior to that time, by force of another order, made afterwards.
15. Where an order of discontinuance was vacated upon insufficient grounds, the facts discussed, and the order vacating such order reversed, and the order of discontinuance affirmed.
16. An order removing a trustee held appealable, and that upon such appeal the court of appeals will examine the affidavits and evidence, and the whole merits of the determination appealed from.
17. When one judge of the supreme court overrules the decision of another judge, under pretext of a rehearing, upon substantially the same state of facts, and when orders are made, subsequent thereto, by which a valid settlement and final discontinuance of the proceedings were avoided, upon grounds which were not only false in fact, but insufficient in substance ; it involves a principle which affects the administration of justice in this state, and presents a question eminently proper to come before the court of appeals for review.
18. In such a case the court of appeals have power to examine the whole case upon the merits, and to make such order in the premises as it shall deem suitable and proper, in view of all the circumstances.
19. The rules and practice of the courts have been established to protect the rights of parties, and constitute a part of the equitable jurisprudence of this community.

June Term, 1866.

On the 27th day of February, 1862, Gabriel Winter died intestate, seized of real estate, situate in New York and Queens counties, of the value of two hundred thousand dol-

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lars (\$200,000), and personal estate of the value of twenty-five thousand dollars (\$25,000), leaving him surviving his widow, Jane Winter (who died April 19th, 1862), and William Winter, his son, and Mortimer Livingston and Henry W. Livingston, his grand-children by his daughter Mary Jane (who died March 29th, 1858), his only heirs.

Letters of administration were taken out May 21st, 1862, by his son William Winter, with whom was joined John Livingston, the father of the above named Mortimer and Henry W. Livingston, who are infants.

All the property and papers belonging to the estate, as well as the business thereof, was taken into the charge and possession of John Livingston; and he proceeded to collect the rents, made the repairs, paid the taxes, made the insurances, and (as he says) exercised general supervision and control over the same, except as to the sum of five thousand eight hundred and seventeen dollars sixteen cents (\$5,817.16), belonging to the estate, which was deposited with the United States Trust Company, to be drawn out only on their joint checks.

Afterwards, and on the 20th day of January, 1863, upon the application of John Livingston, as guardian for his children, a *commission "de lunatico inquirendo,"* was issued out of the supreme court, directed to three commissioners to inquire into the alleged unsoundness of mind of William Winter. The commission was duly executed, and a verdict rendered that William Winter was not of unsound mind. Upon application to the court, this verdict was confirmed October 17th, 1863, although two of the commissioners certified that they thought the verdict was erroneous.

Livingston thereupon took measures to obtain a trust deed, still believing (as he says) said William to be wholly incompetent to manage his own affairs, in consequence of his well known weakness of mind and credulity; and that the only practical mode remaining to secure William against want, by saving to his own use his real estate, was by obtaining the execution of a trust deed under the statute. On the fourth day of December, 1863, Livingston delivered to Daniel

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C. Birdsall, who had been the attorney of William Winter, an engrossed copy of the proposed trust deed, leaving the name of the proposed trustee a blank. Birdsall returned it unexecuted, and then another was drawn up, making some alterations, and naming Daniel C. Birdsall, as trustee. After Mr. Winter had taken counsel of Judge Edmonds, and on the 23d day of December, 1863, a trust deed was formally executed to Daniel C. Birdsall, as trustee. The circumstances under which it was executed, are noticed more at large in the opinion of the court.

This trust deed, after the formal parts, proceeded as follows: That said William Winter, for and "in consideration of the sum of one dollar," lawful money of the United States, and for settling and granting all his right, title and interest, in and to all and singular, the real estate and property hereinafter mentioned, upon the trusts, and for the purposes hereinafter expressed and declared, hath granted, bargained, sold, aliened, remised, released, conveyed and confirmed, and by these presents doth grant, bargain, sell, alien, remise, release, convey and confirm, unto the said party of the second part, all the claim, right, title and interest of him the said William Winter, of, in and to, the equal undivided half part of the following described real estate (here follows a description of the same), together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, . * * * to have and to hold, all and singular, the said herein before granted, mentioned and described real estate and property, with the appurtenances, unto the said party of the second part, his successors and assigns: Upon trust, to receive the rents and profits thereof, and to apply such rents and profits to the use of him, the said William Winter, during the term of his natural life, and upon the death of the said William Winter, to assign, transfer and convey, all and singular, the real estate and property hereinbefore mentioned, described and conveyed, in manner following, that is to say, to the

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lawful issue of said William Winter, living at the time of his death, according to the rules prescribed by the statute regulating the descent of real property; and in case of said William Winter dying without leaving him surviving any such lawful issue, then upon the further trust to assign, transfer and convey, all and singular, the said real estate and property, to his nephews now living. Its other provisions are not material.

After the execution of the trust deed, Livingston says that Birdsall proposed to him to permit him to take possession of one-half of the real estate, and on the twenty-ninth of January, 1864, he brought to Livingston for execution, a proposed agreement for that purpose, which Livingston declined on account of his distrust of Birdsall, fearing that the only design of Birdsall was to involve the estate in litigation and expense, and that he would manage in such manner with reference to William Winter, as to deprive him of his property, said Livingston (as he himself says) finally declined to put Birdsall in possession of any such real estate, and declined to join with him in the execution of any lease or leases thereof, so that he is not now (June 4th, 1864), and never has been in possession of said real estate, or of any part thereof, and that Birdsall never has had the management and control of said real estate, and has never paid anything for taxes, insurance or repairs thereon; that on one occasion he paid to a painter the sum of one hundred sixty-seven dollars and fifty cents (\$167.50), for account of painting, which Livingston had theretofore caused to be done.

Birdsall being dissatisfied with this condition of things, and having, as he alleges, been refused moneys which properly belonged to him under the deed of trust, on the 30th day of May, 1864, commenced a suit against Livingston's children, in partition, to divide the real estate, and obtained an injunction order restraining Livingston from collecting any of the rents of the said estate.

On the fourth day of June, thereafter, Livingston, as guardian of his infant children, on his petition, papers and

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affidavits, obtained from Justice J. F. BARNARD an order to show cause before the special term to be held at chambers in the city of New York, on the thirteenth, why Birdsall should not be removed as trustee, and some other person appointed to execute the trusts therein named.

The order provided that in the meantime, and until the further order of the court, Birdsall should refrain from collecting any of the rents, or in any manner interfering with the trust property.

The hearing was finally set down for the twenty-ninth of June, with leave to serve additional papers until the twenty-fifth. On the first day of July, this petition after a hearing by Justice LEONARD, holding the special term, was denied upon the merits.

Livingston appealed to the general term, but afterwards countermanded his appeal, having on the fifteenth day of July, following, obtained an order from Justice G. G. BARNARD, at a special term, to show cause before the court, at special term, in the city hall, on the third Monday of July, why the petitioners should not have leave to renew their application for the removal of Daniel C. Birdsall from the office of such trustee, under the trust deed of said William Winter, and to apply for the appointment of Daniel Develin, the City Chamberlain of the city of New York, as such trustee.

This motion came on before the same justice, at special term, at the city hall, on the first day of August, and after argument, was granted; and it was further ordered, that such application be heard on the eighth day of August, at eleven o'clock in the forenoon, before the special term to be held at the city hall.

In pursuance of this direction, the application was renewed before the special term then held by Justice JOSEPH F. BARNARD, who took the papers, without rendering a decision at the time.

Prior to the order granting leave to renew the application, a receiver had been appointed in the partition suit, and

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neither Livingston or Birdsall were permitted to possess themselves of the rents of the real estate.

On the third of October, 1864, and before any decision had been promulgated by Justice BARNARD upon the second application or re-hearing, the parties came together and effected a settlement.

On that day an agreement was made and entered into, between William Winter of the first part, Daniel C. Birdsall of the second part, and John Livingston, guardian of his children, of the third part, to perfect such settlement, which was duly executed under their respective hands and seals, and which recited that the above named William Winter, Mortimer Livingston and Henry W. Livingston, were heretofore seized in fee simple, as tenants in common, of all the house lots and real estate mentioned in schedules Nos. one and two, hereto annexed, and heretofore owned by Gabriel Winter, their common ancestor, now deceased; and while so seized, the said William Winter made and executed to the above named Daniel C. Birdsall, a deed and conveyance in fee, of his one equal undivided half of his said houses, lots and real estate, *in trust* (&c., as stated in the trust deed). And, whereas, since the execution of the said deed of trust, the said parties of the first part and second part, have brought an action in the supreme court of the state of New York, against the said John Livingston, Mortimer Livingston and Henry W. Livingston, for the partition among said tenants in common, of said houses, lots and real estate, in which action a receiver of the rents, issues and profits, of said houses, lots and real estate, has been appointed by said supreme court, and which said receiver is now in the receipt of said rents and profits; and whereas, the said houses and lots, and real estate, are so situated that it is best for the interest of all parties concerned, that partition thereof should not now be made, and that the parties interested in the receipt and enjoyment of said rents, issues and profits, should not be subjected to the losses and expenses necessarily consequent upon a receivership of the same, and that each party entitled thereto, should have and enjoy the leas-

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ing, care and custody, of his or their portion of said houses, lots and real estate, and the collection and receipt of the rents, issues and profits thereof. And whereas, a mutual compromise and agreement for the settlement and arrangement of all said matters, has been made by and between the said William Winter and the said John Livingston, as guardian as aforesaid (The agreement then proceeded as follows) :

Now, therefore, this agreement witnesseth, that from and after the day of the date hereof, the said Daniel C. Birdsall, as assignee and trustee of William Winter, as aforesaid, shall have and enjoy the exclusive right of letting and leasing the several houses, lots and real estate, particularly mentioned and described in schedule No. 1, to this indenture annexed, and of collecting and receiving the rents, issues and profits thereof.

The agreement then makes a similar provision in favor of Livingston, as to the houses, lots and real estate in schedule No. 2. It then provides that all the leases shall be in their joint names, and that no lease shall be given by either of the parties for a longer term than one year, without the express consent of both in writing, duly acknowledged. Settlements were to be made on the first day of January and July, in each year, when an account was to be rendered, and a balance struck and balance paid, so as to make one's receipts of net proceeds for the half year equal to the others.

Birdsall and Livingston further agreed that each should keep the buildings properly insured at all times, and promptly pay all taxes and water rates on the buildings assigned to them respectively by schedules Nos. one and two, and also should "keep all parts and portions of said premises in proper and suitable repair, and defray all expenses of so doing, but neither, however, to exceed two hundred dollars in any one-half year without the written consent of the other."

The insurance to be effected in their joint names. One party could not interfere in the collection of the rents assigned by said agreement to the other; but each party

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was to have the exclusive control and management of the premises assigned to him by said agreement, except as therein otherwise provided.

The agreement was to continue in force during the trust, and no action or other proceeding of any kind to obtain any further partition should at any time be prosecuted by either of the parties.

It was made a condition of the said agreement, that Livingston should not at any time thereafter, by suit or proceedings at law, or in any other way interfere with or molest William Winter, or his person, or his residence, or attempt in any way, directly or indirectly, to control or influence, or direct him in respect to his residence, personal movements or expenditures.

And it was mutually covenanted, that except as provided in said agreement, Birdsall and Livingston should not be liable to account to each other, of and concerning the rents and profits of said property, during the life of William Winter, and that neither Birdsall or his successor in the trusteeship, should be molested or interfered with, by action or otherwise, by said parties of the third part, except to compel due execution and performance of such agreement.

After this agreement was duly executed and acknowledged by all the parties thereto, and on the same day, a stipulation in writing was entered into, signed by *Daniel C. Birdsall*, trustee, *William Winter* and *John Livingston*, guardian for infant petitioners, and *Samuel G. Courtney*, attorney for Birdsall and Winter, by which it was agreed by and between all the parties thereto, *that each and any order made in the matter of the application of said infants, by John Livingston, their guardian, for the removal of Daniel C. Birdsall, from the office of trustee, be vacated*, and that an order to that effect might be entered by any of the parties, and *that all the proceedings therein be discontinued*, without costs to any of said parties as against the others, and that an order to that effect might be entered by either party, and that the injunction order granted them on the eighth of August, 1864, be vacated and dissolved.

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On the next day, at a special term held before Justice LEONARD, at the city hall, in New York, on filing the stipulation, and on motion of John W. Edmonds, for the petitioners, an order was entered in pursuance of the stipulation, *vacating each and every order in said proceedings, and discontinuing the said proceedings without costs to any of said parties as against the others*, and dissolving the injunction.

Here the matter rested, and the parties went on under their agreement of October third, 1864, until the twelfth day of April, 1865, at which time Justice JOSEPH F. BARNARD published his decision, and an order was entered with the clerk of New York, removing Daniel C. Birdsall as trustee of William Winter, and appointing John B. Haskin in his place and stead, upon his filing a bond in the penalty of twenty thousand dollars (\$20,000), with sureties to be approved by a justice of the supreme court.

On the twenty-fourth day of April, 1864, John B. Haskin, having executed the required bond, applied to Justice GEO. G. BARNARD for an order requiring Birdsall to account as trustee, and pass his account before a referee, in the usual manner; upon which occasion the said justice granted an order that said Birdsall show cause before him, at the chambers of the supreme court in the city hall, on the twenty-sixth of April, why such an order should not be made.

On the twenty-sixth of April, the said justice at a special term, granted the order, no one appearing to oppose it. And he further directed, that the tenants of the premises in schedule No. 1, account and pay all the rents to said John B. Haskin, and attorn to him as such trustee.

On the eighth day of May, 1865, Birdsall applied to Justice SUTHERLAND, and obtained an order upon Livingston and John B. Haskin, to show cause before this court, at a special term to be held in the city hall, on the fifteenth day of May then instant, why the order of the twelfth of April, removing him as trustee, should not be vacated and set aside, on the ground that the proceedings in said application had been *settled and discontinued*; also why the above order of the twenty-sixth of April should not be vacated for

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the same reason ; and in the meantime staying the proceedings of Livingston and Haskin, under said orders.

On the next day, May ninth, 1865, John B. Haskin obtained an order from Justice JOSEPH F. BARNARD, dated at Poughkeepsie, requiring Birdsall to show cause before him, at a special term to be held at his chambers in Poughkeepsie, on the thirteenth day of May, then instant, why the caption of the order of April the twelfth, removing "Birdsall as trustee, should not be amended, so as to read the — day of the actual making thereof, to wit: the — day of August 1864, *nunc pro tunc*, and stand as the order of the court of the last mentioned date." And on the thirteenth, the said justice, at a special term held at the court house, in Poughkeepsie, granted the motion, and directed the order of April twelfth, 1865, to be "amended, so that the date thereof shall be entered (now for then) as of the last mentioned date, being the date of the rendition of the decision in this matter, and of the making of said order." This order was granted on motion of John B. Haskin, no one appearing to oppose it.

On the twenty-seventh day of May, 1865, on application of John B. Haskin, Justice SUTHERLAND granted an order on Birdsall, to show cause at a special term, in the city hall, New York, on the thirtieth day of May, then instant, *why the order of Justice LEONARD discontinuing the proceedings, bearing date October fourth, 1864, should not be set aside and vacated.*

On the seventeenth day of June, 1865, Justice SUTHERLAND, at a special term, *denied the motion of Birdsall to vacate the order of the twelfth of April, as amended by the subsequent order of May thirteenth, whereby said Birdsall was removed as trustee. He also denied the motion to vacate the order of April twenty-sixth, whereby Birdsall was directed to state his accounts as such trustee. And on the same day he granted the motion of Haskin, whereby the order of discontinuance granted by Justice LEONARD was directed to be vacated and annulled.* No costs were allowed to either party.

Birdsall and Winter appealed to the general term from the

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order of Justice JOSEPH F. BARNARD, of April twelfth, 1865, removing Birdsall as trustee. Also from his order of May thirteenth, 1865, directing his former order to be amended and *entered nunc pro tunc*, as of August thirty-first.

Also from the two orders of Justice SUTHERLAND, of June seventeenth, 1865, one of which denied the motion to vacate the two orders of Justices J. F. and GEO. G. BARNARD, removing Birdsall as trustee, and requiring Birdsall to account to Haskin, as the substituted trustee; and *the other, of which annulled and vacated the order of discontinuance granted by Justice LEONARD.*

All these appeals were heard at the same general term in New York city, and the order appealed from *affirmed with costs.*

Upon the appeal to this court, an application was made at the March term, in behalf of the appellants, for a stay of proceedings pending the appeal, which was granted, with a direction that in the meantime *William Winter, the beneficial owner of the rents and profits of the trust estate, be allowed to collect the rents for himself*, and with liberty to the respondents to bring on the appeals for argument at the succeeding June term.

The nature and character of the evidence upon the application of the Livingstons to remove Birdsall as trustee, together with the circumstances under which a re-hearing was granted, and the subsequent orders made, so far as they are material, sufficiently appears in the opinion of this court.

WILLIAM F. ALLEN, and ALEXANDER S. JOHNSON, *for appellants.*

JOHN W. EDMONDS, *for the respondents.*

JOHN H. REYNOLDS, *for Haskin.*

By the court, MORGAN, J. It is important to a proper consideration of the several questions presented by these appeals, to understand the position which the respective parties occupy towards each other, and the equity of each to

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invoke the aid of the courts under the trust deed, for the protection of their respective rights.

This trust deed was voluntary on the part of William Winter, securing to himself the rents, issues and profits of a real estate, confessedly worth one hundred thousand dollars (\$100,000), during his life, with remainder over to his heirs. And on default of heirs, to his nephews *Mortimer and Henry W. Livingston*. As he had no children, it may perhaps be assumed that the nephews in question take a vested remainder under our statute, which doubtless gives them a standing in court to invoke its aid to protect the *corpus* of the estate from destruction, by the unlawful acts of the tenant for life.

So far as the deed creates a trust in Birdsall, to receive the rents and profits, and apply them to the use of William Winter, during his life, it is expressly authorized by statute (1 *R. S.* 729, § 55). So far as it requires the trustee to assign or convey the legal estate to those who shall be entitled in remainder, under the trust deed, his services will be useless, as the transfer will be made, if at all, by operation of the statute of uses, and his office as trustee will then terminate (4 *R. S.* 730, § 6).

As against William Winter, the creator of the trust, and the beneficial owner of the rents, issues and profits of the legal estate during his life, the court will not, I think, interfere in behalf of his nephews, to give them more than is secured to them by the very terms of the settlement (*Hill on Tr.* 83; *Hays* agt. *Kershaw*, 1 *Sandf. Ch. Rep.* 258), although the deed of settlement is silent on the subject, doubtless those claiming in remainder under it are interested in the management of the estate, and the tenant for life owes them certain duties which a court of equity may enforce. A tenant for life, in respect to these duties, stands in the nature of a trustee to the remainder; but this is an implied, and not an express trust (*Joyce* agt. *Gunnels*, 2 *Rich. Eq.* 259).

If the tenant for life is guilty of any species of waste calculated materially to injure or destroy the value of the estate

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in remainder, it is perfectly competent, and in truth is the constant practice in this country as well as England, for the remainder-man to resort to the prompt and efficacious remedy by an injunction bill (4 *Kent*, 17). Upon such a bill a court of equity might require security of the trustee for the due performance of those duties which the law casts upon him in respect to the preservation of the *corpus* of the trust estate.

Since it has become impossible under our statutes (1 *R. S.* 730, § 65), for the trustee in such a cause, to alien or dispose of the real estate to the injury of the remainder-man, there are but few occasions when it can be necessary or proper for the court to interfere with the management of the trust, except on behalf of the beneficial owner for life.

In this case, William Winter, the creator of the trust deed, is the only person who is legally interested in the execution of the *express trusts* therein mentioned.

There are no express trusts in favor of the petitioners. The obligation on the part of the trustee to preserve the *corpus* of the estate for the benefit of those entitled in remainder, does not rest upon any *express trusts*, but is to be implied, if it exists at all.

Keeping in view the relations which these several persons sustain towards each other, I will now proceed to notice the several questions presented by the appeals.

I. It will be seen that *William Winter*, the equitable owner of the estate for life, and who alone is interested in the execution of the trusts mentioned in the deed of trust, is a *party defendant* in these proceedings. I am not aware of any case where the court has entertained a petition for the removal of a trustee under our statutes, at the instance of those entitled in remainder, and against the wishes of the *cestui que trust*, for life. Nor do I think the statute intended to authorize such a proceeding. Section 55 (1 *R. S.* 728), authorizes the creation of an express trust "to receive the rents and profits of lands, and apply them to the use of any person, during the life of such person."

This is such a trust. Section 70, taken in connection with

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section 72, provides that upon the bill or petition of any person *interested* in the execution of an *express trust*, therefore, authorized, the court of chancery may remove any trustee who shall have violated or threatened to violate his trust, or who shall be insolvent, or who shall for any cause be deemed an unsuitable person to execute the trust.

It was said by the chancellor, in the *Matter of Van Wyck* (1 Barb. Ch. R. 565), that independently of these statutory provisions, the court had no power upon a mere petition to discharge a trustee, and that the usual course of proceedings was by bill (*and see Hill on Tr.* 194).

As a general rule, petitions can only be presented in an action already commenced, or in a matter over which the court has jurisdiction, by some act of the legislature or other special authority. Under the English statutes, sundry cases of trusts were provided for, in which a remedy might be had by petition, but the courts uniformly held that the remedy could not be extended by construction, to include other cases. In *ex parte Brown* (Cooper, 295), Lord ELDON discharged an order that had been made upon petition, stating that in his opinion, constructive trusts were not within the meaning of the statute.

And in *ex parte Skinner* (2 Mer. 453), it was held that the statute was meant to extend only to cases of plain breach of trust committed in their character as trustees. (*And see Hill on Tr.* 193; 3 Dav. Ch. Pl. and Pr. 2099).

It is quite certain that our statute authorizing any persons interested in the execution of express trusts, to apply for the removal of the trustee upon petition, was only intended to embrace that class of persons who were immediately interested, and who might be injured by a violation of the trust, or by the insolvency or other incompetency of the trustee.

In this case, I think William Winter was the only person interested in the execution of the trust, within the meaning of the statute, and that it was erroneous for the court below to entertain a petition for the removal of Birdsall from his trust, except upon the application of Winter.

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It does not, however, appear that the appellants took any objection of this character; perhaps they should have moved to dismiss the petition, in order to avail themselves of the objection, and it may be too late after litigating the petition upon the merits, to raise such a question. If, however, the court below was without jurisdiction in the first instance, as I am inclined to believe, I think it is not too late to raise the objection, although it is well settled that a stranger could not avail himself of it (*People agt. Norton*, 9 N. Y. R. 176).

II. If it should be conceded that the proceedings by petition were regular, or that jurisdiction was acquired in consequence of the appellants neglecting to take the objection in time, then it will be necessary to examine into the matter of the petition, before we are prepared to pass upon the other questions raised by the appeal.

It contains a great many things which are quite foreign to the matter in hand, and many of its most important statements rest upon information and suspicion. It contains, however, one statement, which if sustained by the evidence—and I am not prepared to say that it is not—would induce the court to refuse at once to entertain any proceedings to give effect to the trust deed in favor of these respondents, or any other of the parties claiming under it.

It is said in the petition, that William Winter was incompetent to devise real estate.

This is stated by Mr. Livingston in his letter to Judge Edmonds, but a few days before the execution of the trust deed. The petitioners also say “that said William Winter being a person of very weak understanding, and incapable of transacting business, or managing his own affairs; so credulous as to believe the most improbable and absurd statements, and so timid as to be easily frightened into almost any course of action that might be suggested to him; easily alarmed and imposed upon by any designing person—said Birdsall has taken advantage of William’s weakness of mind and character, and of his (Birdsall’s) own relations as such attorney and trustee toward him, for the purpose of

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defrauding, deceiving and misleading him. *That at the time the execution of said trust deed, December twenty-third, 1863, was obtained by Birdsall, * * * and for more than a month prior thereto, he had been acting not only as the agent, attorney and counsel of William, but as his guardian and custodian; that said Birdsall has abused the confidence reposed in him by William, solely for his own gain and advantage; that by falsehood, trickery and deceit, he has induced and compelled William to avoid all communication with, and keep away from his own relatives, acquaintances and other advisers, whilst by like fabrications and false statements, has prevented such relatives from calling upon William, he (Birdsall) keeping himself in communication with, and deceiving both parties.* * * *

That the execution of said trust deed was procured by Birdsall through fraud and deceit practiced upon said William, and upon said Livingston; and his counsel Gilead B. Nash (Livingston's partner), in his affidavit annexed to the petition says: that he "never had any doubt of the fact that said William is a person of unsound mind."

It appears that Livingston himself proposed that Winter should execute a deed of trust, although he preferred somebody besides Birdsall for trustee. He finally assented to have Birdsall's name put in. "This, however," says Mr. Nash, "was a matter of necessity, for Mr. Birdsall repeatedly stated both to me and Livingston, that he would not allow William to execute the deed unless it should be made to him."

William Winter, however, in his affidavit, states that he executed the trust deed without any compulsion, fraud, duress, threats or misrepresentations of any kind, upon the part of Birdsall or any other person; and that he is still satisfied with it, and with Birdsall as his trustee; that he selected Birdsall by his own choice, although Birdsall at the time informed him that he was comparatively speaking a poor man; that he made inquiries as to Birdsall's character and integrity, and became satisfied, and is still satisfied, that

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Birdsall will carry out the said trust deed with faithfulness and honesty.

He further states that he executed the said trust deed, "believing it to be the best thing he could do to get away and be relieved from the annoyance and harrassing of said Livingston, and believing that thereby he could have the quiet and rest from vexation he so much desired to have, and desires." Mr. Birdsall, in his affidavit, states that Livingston urged him to advise William Winter to make a trust deed; that Livingston offered him \$2,000 for his trouble, if he would get him to execute such an instrument as he (Livingston) had prepared for him; that Livingston said he did not offer it as a bribe, but that William Winter was very close, and would not pay him (Birdsall) for his services. Birdsall says, he declined this proposition. He says, that Livingston told him frequently, that he (Birdsall) ought to make from two to three thousand dollars a year out of the trust, and that he (Livingston) would not take charge of it for less than that sum.

That in the month of May, 1864, Livingston stated to him that it would be impossible for Birdsall and Livingston to get along together, and it would be better for all parties for Birdsall to resign his trust; that Livingston offered him \$5,000 if he would resign, and \$5,000 more if he (Birdsall) would get him (Livingston), or some person he (Livingston) would select, appointed trustee, the moment the order for such appointment was entered.

Birdsall says, he declined, whereupon Livingston got angry, and swore he would have him removed, whatever it might cost. Mr. Livingston in a subsequent affidavit denies that he ever made any offer of the kind.

The case tends very strongly to show that the deed of trust was obtained by fraud and undue influence; both Livingston and Birdsall co-operating together to induce William Winter to execute it; and as it is expressly charged in the petition that Winter was of unsound mind when it was executed, and that the deed was obtained from him by fraud and undue influence, it was clearly the duty of the court

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below to dismiss the petition, unless the judge was fully satisfied that the trust deed was the voluntary act of a sane man, competent to make it. A court of equity will never interfere in favor of a party who takes under an instrument executed by a person who is *non compos*, or when executed under duress, or under terror or apprehension; nor suffer them to take effect if they are accompanied by any circumstances of imposition or apprehension. (*See Hill on Tr.* 156, and seq.)

In order, therefore, to sustain the orders made for the removal of Birdsall as trustee, and the appointment of Haskin to carry out the trusts, the petitioners must of necessity concede that *William Winter was not only competent to make the deed of trust, but that it was fairly and voluntarily made, when he was neither under duress or restraint.* Otherwise the court would doubtless set it aside on complaint of William Winter, or of his committee.

III. Assuming, however, that William Winter was competent to create the trust, and that the deed is valid, there is but little left in the case as made out by the petitioners, upon which to found an order for the removal of Birdsall as trustee. In my opinion the court ought not to remove him against the wishes of William Winter, who has an undoubted right to give away the rents and profits of the trust estate to whom he pleases, without interference from the petitioners. He may, if he pleases, pay Birdsall's debts out of these same rents and profits, and it is not for Livingston to prevent him from doing so.

But it is claimed that William Winter is liable to be imposed upon; that he is an imbecile, and incompetent to manage for himself; without undertaking to deny that this may be in a measure true, what is the result? It does not advance the case of the petitioners, or aid in sustaining the proceedings in the court below. If the court erred in affirming the verdict of the jury upon the *commission de lunatico inquirendo*, that error cannot be corrected in these proceedings. From the nature of the evidence tending to establish the lunacy of William Winter, there is no doubt that if he is

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now incompetent to manage his own affairs, he was equally so when he made the deed of trust, and this would lead to a result quite foreign to the expectations of the petitioners who claim under it, as we have already had occasion to notice. Now whether Birdsall is insolvent or not ; whether he is using a portion of the rents and profits for his own benefit, and to pay his debts, in order to relieve himself from insolvency, is a question between him and William Winter, and the creditors of William Winter. When the petitioners state that William Winter's debts are accumulating upon him by the negligence and dishonesty of the trustee, they are interfering with a matter over which they have no control whatever.

It will be time enough for Livingston to make such a complaint when he is constituted one of the committee of the person and estate of William Winter ; and until that time, he has no claim upon the court to interfere with William Winter or his trustee. As yet William Winter has not been pronounced a lunatic or a person of unsound mind, by the judgment of a competent court, and we must, therefore, concede to him the same right we concede to others who are the owners of a large estate—the right *to dispose of it* by gift, grant or devise, to whomsoever he pleases, without being called to account for it in a court of equity, by those who have no legal control over him or his estate. In my opinion, therefore, the order or decree of Justice LEONARD, of July 1, 1864, denying the application of the petitioners, was right. First, upon the ground that the petitioners had no right to apply by petition for Birdsall's removal as trustee ; and secondly, *upon the merits*.

As the *re-hearing* before Justice JOSEPH F. BARNARD, was substantially upon the same state of facts, it may not be necessary to proceed any further in the discussion of these appeals, as we must necessarily come to the conclusion that the subsequent decree removing Birdsall as trustee, and the appointment of Haskin in his place, cannot be sustained upon any theory of the case.

IV. As this is however a very extraordinary case, I will

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proceed to notice the proceedings subsequent to the decree of Justice LEONARD dismissing the petition. The very statement of the case, with the various orders made by the various judges during its progress to this court, is sufficient to attract our attention, and create some suspicions at least, that the forms of law have been strangely perverted, to accomplish objects which could not have been attained by the regular and orderly administration of justice.

(1.) I will first notice the order for a re-hearing, granted by Justice GEO. G. BARNARD at special term. It is called an order *granting leave to the petitioners to renew their application*, but it is doubtless an order for a *re-hearing* of the petition upon the merits, with respect to applications made in an action, they may doubtless be one made by petition as well as by motion, and the practice is the same, whichever form the application takes (1 *Barb. Ch. Pr.* 578).

In relation to special proceedings authorized by the Code, when the remedy may be had by petition under section one, the rules governing ordinary motions do not apply; but instead of obtaining leave to renew the application, the defeated party was required by the former practice of the courts to apply for a re-hearing in the same manner as upon a decree or order (1 *Barb. Ch. Pr.* 353).

An order made upon motion was not a proper subject for re-hearing, but might be discharged by application, by motion to the court. But if the order of Justice G. G. BARNARD is treated as an order made on motion, I think it was made in violation of the practice of the court, and certainly in violation of rule twenty-three of the supreme court, which prohibits a second application upon the same state of facts to be made to any other judge than the one who decided the original application.

(2.) It is at least questionable whether a re-hearing upon the merits can be granted since the Code of Procedure, except upon an appeal to the general term. Doubtless the court at special term may at any time within a year, relieve the party from a judgment, order or other proceedings taken against him, through his mistake, inadvertence, surprise or

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excusable neglect, upon terms, or grant a new trial in the cases provided for in civil actions, according to the rules and practice of the courts. But there is no provision in the Code that I am aware of, when the trial is by the court, which authorizes an application to the court at special term for a new trial upon the merits. It may be said, however, that by another provision of the Code, in cases left unprovided for, the former practice may be resorted to (§ 468). Certainly the Code has not attempted to regulate the practice in special proceedings, except upon appeals. By the laws of 1854, page 592, certain provisions of the Code are made applicable to special proceedings. That act provides that an appeal may be taken to the general term from the final order of the special term in special proceedings, and that the practice on such appeals shall conform to sections 322, 329, 330 and 332 of the Code. By reference to these sections, it will be seen that the appellate court may, upon such appeal, reverse, affirm or *modify* the order appealed from, and may order a *new trial*. It is doubtful, I think, whether the court at special term can entertain an application for a new trial upon the merits, as that power seems to be vested in the court at general term.

But if the former practice is still in force in respect to rehearings in equity in this state, I am of the opinion that the court below erred in granting a re-hearing in this case. (1.) It was not a case for a re-hearing. A re-hearing will not be granted on account of the discovery of new evidence or new matter, nor because the importance of the testimony has only been ascertained since the decision, nor to obtain accumulative testimony, nor for the purpose of contradicting the adverse parties witnesses (7 Barb. Ch. Pr. 354-5, and cases cited).

Certainly the power to grant a re-hearing, cannot be arbitrarily exercised; and if the judge grants it upon insufficient grounds, it is an error which should be, and will be corrected by the appellate court, whenever the question is properly brought before it for review.' (2.) But in my opinion there is another grave objection to the order of Justice BARNARD,

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granting a re-hearing of the petition, except before the same judge who denied the original application. Chancellor WALWORTH, in *Winship* agt. *Pitts* (3 *Paige*, 260), says, that after an application has been made to the vice chancellor in open court, and been denied by him, it is irregular to bring the same question before the chancellor, except by way of appeal, and after a decree has been made by the chancellor, it is not competent for any vice chancellor to make an order or decree which would directly or indirectly discharge, alter or modify the same (*Greenwich Bank* agt. *Loomis*, 2 *Sandf. Ch. R.* 70). Nor will one vice chancellor modify or interfere with a decree made before another vice chancellor (*Astor* agt. *Wood*, 3 *Ed. Ch. R.* 371).

So in England; a cause heard before the chancellor may be re-heard before the chancellor or his successor in office. If it has been before any of the other judges, it may be re-heard before the judge who heard it before, or before the lord chancellor, in which case it is generally termed an appeal, although in fact it is only a re-hearing. When the statute (5 *Vic. C.* 5) created two additional vice chancellors, it was made one of the provisions of the act "that one vice chancellor could not *rehear* any matter in which an order or decree had been made by another vice chancellor" (3 *Dan. Ch. Pl. and Pr.* 16, 17, 18).

Although we have no statute which expressly prohibits one judge from re-hearing a matter decided by another judge, the rule is so well established, and so important, for the protection of parties from unjust vexation, that if it has not already been, it is full time it should be, incorporated into the equity law of this state. (3.) But there is another ground upon which it cannot be permitted, and that is, the doctrine of *res adjudicata*; we have tribunals to whom parties may appeal from an erroneous decision made by a judge at special term, and if parties conceive themselves aggrieved by the decree of one judge, they must take their remedy by appeal instead of applying to another judge to re-hear their complaints.

VI. I will now examine into the validity of the orders

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made by Justice J. F. BARNARD, upon the re-hearing, by which Haskin was substituted trustee in the place of Birdsall, as well as the subsequent orders made to carry that order into effect. If, as I have already attempted to show, the order of Justice LEONARD was right, it follows that the subsequent order of Justice BARNARD cannot be sustained, for it was made upon substantially the same state of facts. But it is unnecessary to rest the case here, *for pending these proceedings before Justice J. F. BARNARD, upon the re-hearing, the parties entered into a valid and binding agreement, by which the controversy was settled; a settlement which was clearly just and advantageous to all the parties.* This settlement, if the trust is valid, ought to receive the sanction of a court of equity, and should be enforced against all the parties. It was suggested on the argument that the settlement was not binding upon the petitioners, because they are infants, but a court of equity will enforce it, if it is made for their benefit, as this clearly was. (*Rogers agt. Cruger, 7 Johns. Ch. R. 557; Scovill's Case, Moseley, 224.*)

It was, therefore, right and proper that the proceedings should be discontinued, as they were, by an order of the supreme court at special term, upon the stipulation of all the parties. This order was made before Justice LEONARD, upon the basis of the settlement, and it in terms vacated all the orders which had been heretofore entered in the proceedings. Notwithstanding the settlement and a formal discontinuance of the proceedings, Justice JOSEPH F. BARNARD, subsequent thereto, and on the twelfth day of April, 1865, made an order on the re-hearing, removing Birdsall as trustee, and appointing John B. Haskin in his place. On application of Mr. Haskin, he afterwards made another order at Poughkeepsie, directing his order of the twelfth of April, 1865, to be entered as of the thirty-first of August, 1864. It is not to be disguised that the object of this last order was to overreach the settlement. It was founded upon the affidavits of Mr. Haskin and the clerk of the court. Mr. Haskin swore that he had the original memorandum order of Justice BARNARD, as follows: "The — day of —

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1864," and that "the erasure of figure four in the year, and the insertion of April twelve, 1865, was an error of the clerk, and such order should be corrected and entered as of August or September, 1864." The clerk swore that about a week or two after the re-hearing in August, the papers came to him from Justice BARNARD by express, and that subsequently he received the decisions written on some of the affidavits used on the motion, which was found in the judge's private room. He also swore that the papers were received and said order made as early as August, 1864. That all this was substantially false in every important particular, plainly appears by the affidavits of the clerk and others, subsequently made and used upon the motion of Birdsall to set aside the order. The clerk then swore that the order of the twelfth April, 1865, *was on that day given to him by Justice GEO. G. BARNARD*, on which day he filed all of the papers in this matter, together with said order, and marked the whole of them; and that he received the *memorandum of the decision before referred to, subsequent thereto, and several days thereafter*; that he did not find it in the judge's private room, *but the same was handed to him in the latter part of April*. He further states that his former affidavit was made under a misapprehension. But this is not all. Birdsall states in his affidavit, and in this he is corroborated by Herman Fox, that on the eighteenth of April, 1865, he examined the papers on file, and *the memorandum in question was not then on the paper* on which it was subsequently found to be indorsed. These facts were not contradicted before Justice SUTHERLAND, on the part of Haskin or Livingston. I think, therefore, it is quite apparent that the order of Justice JOSEPH F. BARNARD, ante-dating his order of removal to August 31, 1864, was made under an entire misapprehension of the facts, and so far as Haskin is concerned, must be regarded as a fraud upon the court. But whether the order was fraudulently obtained or not, the fact is put beyond doubt by the affidavit of the clerk *that no order was published* by Justice JOSEPH F. BARNARD, removing Birdsall as trustee, until the twelfth of April, 1865. It could not take effect

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prior to that time by force of another order made afterwards. There is another order which claims our attention, granted upon the motion of Mr. Haskin, by Justice SUTHERLAND at special term, setting aside the order of Justice LEONARD, already referred to, discontinuing the proceedings. This order was made at the same time that the judge denied the motion to set aside the order of April twelfth, for the reason doubtless that it was regarded as an obstacle in the way of Haskin's getting possession of the trust property under the order of April twelfth.

The reasons of Justice SUTHERLAND for setting aside the settlement of October third, 1864, are not given in the case, but grounds upon which the application was made, deserve attention. Mr. Haskin states in his affidavit that Birdsall pretended that the proceedings in the matter of the petition were discontinued, but that "as he is informed by Livingston, and verily believes to be true, the said Birdsall obtained his signature to the said stipulation and agreement of the third of October, by falsely and fraudulently pretending and representing to said Livingston that the motion argued herein for Birdsall's removal, on the twenty-third, twenty-fourth and twenty-fifth days of August, before the Hon. J. F. BARNARD, had been denied, and by other false representations and pretences." Birdsall, however, in his affidavit denies this, and states further, that "on the thirtieth day of May he called on Livingston and showed him Haskin's affidavit, and that Livingston then told him that all of said affidavit in relation to what Haskin alleges, was said to him by Livingston, as herein referred to, is false and untrue." Mr. Livingston did not make an affidavit in the matter, but it appeared by the affidavits of Mr. Courtney, as well as that of Mr. Birdsall, that the settlement was fairly made by the mutual consent of all the parties interested.

Mr. Haskin, who swore only on information and belief, is not corroborated in his statement that the settlement was made under any misapprehension whatever. Surely the court would not set aside the settlement and stipulation, for

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fraud, when the party who is alleged to have been defrauded does not complain of it.

There are many other things which might be noticed, tending to reflect upon the character of the proceedings under review, but the facts already referred to are sufficient, I think, to enable the court to dispose of these appeals.

VII. It is claimed, however, that no appeal will lie in this case, or that at least that this court will not review the order removing Birdsall as trustee, as it rests in the discretion of the supreme court, and is not subject to review in this court. As I have already stated, an appeal is given by the laws of 1854, page 592, section 1. By section 330 of the Code, which is made applicable to such appeals, this court may reverse, affirm or modify the order appealed from, and may order a new trial. The orders appealed from also affect a substantial right made in a special proceeding, under section 1 of the Code, and for that reason are appealed as such to this court (*Hyatt agt. Seely*, 11 N. Y. R. 52).

No provision having been made by the Code for a finding of facts in such a case, this court is necessarily required to examine the affidavits and evidence upon which the case was decided; an unrestricted appeal takes along with it the whole merits of the determination appealed from (*Bills agt. Voorhees*, 20 N. Y. R. 528).

It may be true, as was said in *Rogers agt. Hosack, Ex.* (18 W. R. 329, 330), that the court of appeals will not interfere to regulate the discretion of a court of equity, when the statute has vested that court with power to remove a trustee for a particular cause, but I think such a principle is not applicable to this case.

Upon the application of William Winter to remove Birdsall for insolvency, the evidence in this case is such that this court would not feel authorized to interfere with the decision of the court, whatever its determination might be; but when the court undertakes to act upon the application of third persons claiming in remainder, who have no immediate interest in Birdsall's insolvency, the question assumes another aspect, and when one judge overrules the decision of another

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judge, under pretext of a re-hearing, upon substantially the same state of facts, it involves a principle which affects the administration of justice in this state, and presents a question eminently proper to come before this court for review.

And so in reference to the orders made subsequent thereto, by which a valid settlement and final discontinuance of the proceedings were avoided, upon grounds which were not only false in fact, but insufficient in substance.

Although no appeal was taken from the order of Justice G. G. BARNARD, ordering a re-hearing of the petition, it is necessarily connected with the final order of Justice J. F. BARNARD, upon such re-hearing, which in effect reversed the previous order of Justice LEONARD, and its validity is doubtless involved in the principal appeal from the final order of Justice J. F. BARNARD, removing Birdsall as trustee, and appointing Haskin in his place.

I have no doubt as to our power to examine the whole case upon the merits, and to make such order in the premises as we shall deem suitable and proper, in view of all the circumstances. This being a proceeding in equity, we may not only reverse, but if necessary, make such final order or decree in the premises as justice may require. (2 *R. S.* 167, § 27; *Laws of 1847*, ch. 280, § 8; *LeGuer* agt. *Gouverneur*, 1 *Johns. Ch.* 436, 499; *Forrest* agt. *Forrest*, 25 *N. Y. R.* 501.)

I have already said enough as to the character of these proceedings to justify us in reversing the orders appealed from on account of their departure from the rules and practice of the court. These rules of practice have been established to protect the rights of parties, and constitute a part of the equitable jurisprudence of this as well as every other civilized community.

But if we look only at the merits of the case, it is impossible to sustain the proceedings. No reason can be assigned for superseding the deed of settlement of October 3, 1864. If the trust deed is to stand, there could be no more proper arrangement made for securing the rights of all the parties, and the preservation of the *trust estate*. If we lay out of

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view the insufficiency of the evidence upon which the deed of settlement was overreached by order of Justice SUTHERLAND, there is no ground upon which the court could properly make such an order upon the motion of Mr. Haskin. He had no interest whatever in the original controversy, and his subsequent appointment as trustee did not give him any standing in court to interfere with the prior proceedings. He was merely a volunteer, and yet we find that the court acted solely upon his motion in granting the application which in effect overreached a settlement of the entire controversy, mutually beneficial and satisfactory to all the parties.

I would, therefore, advise that all the orders appealed from be reversed, and that the order of Justice LEONARD, made at special term, October 4, 1864, by which the proceedings were discontinued, without costs to either party, be affirmed. This will leave the parties to go on under the deed of settlement made and signed by all the parties October 3, 1864.

Although the case furnishes strong grounds for setting aside the trust deed, that question is not properly before us. As to the costs, we may award them at our own discretion (*Laws* 1854, p. 592, § 3). I think the respondents should be charged with the costs of all the proceedings taken by them after the settlement of October 3, 1864, together with the costs of the appeals in this court.

All concur.

SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW YORK agt. THOMAS R.
STOCKING.

The act of a board of supervisors in examining, settling and allowing accounts against the county, is a *judicial act*, and they are not liable in any *civil action*, however erroneous or wrongful their determination may be; and their decision is binding upon all parties concerned.

But where a supervisor, acting as a member of the board, *knowingly, corruptly,*

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unlawfully and partially votes that an account presented against the county as a county charge, be allowed, and made a charge against the county, he is guilty of a misdemeanor, and may and should be indicted, tried, convicted and punished.

Although the power of a board of supervisors to examine, settle and allow accounts, is in its nature *judicial*, and that parties interested are bound by the decision in all cases calling for the exercise of judgment and discretion; yet the same board of supervisors may *re-examine* an account once passed upon, and *reject it, or reduce the amount first allowed.*

The claimant acquires no fixed right until the *final action* of the board upon his claim; and until he has received the order for the payment of his claim, the board has jurisdiction over it.

If a supervisor *wickedly abuses, or fraudulently exceeds his powers*, he is punishable by indictment, although the board might not have had jurisdiction of the subject matter upon which he acted. It is not essential that any injurious effects should result to *individuals* from the misconduct of the supervisor.

It is a rule that *time and place*, when and where the crime was committed, must be stated with certainty in the indictment; but it is not necessary to *prove them on the trial as stated*, unless they are necessary ingredients in the offense.

Erie General Term, September, 1866.

Present, GROVER, P. J., DANIELS, MARVIN and DAVIS, Justices.

CERTIORARI to the Erie oyer and terminer.

The case appears sufficiently in the opinion of the court.

LYMAN K. BASS, *district attorney.*

GEO. B. HIBBARD, *for defendant.*

By the court, MARVIN, J. The defendant was a supervisor of one of the wards in the city of Buffalo, and a member of the board of supervisors of Erie county, and was indicted, tried and convicted of corruption in such office.

The substance of the first two counts in the indictment may be briefly stated thus: that the defendant procured from one Taylor articles (specifying them) for his own use, and that Taylor presented the account for such articles, and other articles furnished to other persons, for their use, to the board of supervisors, to be examined, settled and allowed as chargeable against the county; and that the defendant, as one of the supervisors, well knowing that the account was not a lawful charge against the county, confederating and combining with other members of the board, knowingly, corruptly, unlawfully and partially voted that the

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account be allowed, and that it was allowed to the amount of \$3,926.81, and that it was paid by the county. It is alleged that this occurred at a meeting of the board, lawfully convened, on the 28th day of December, 1865. The third count contained a similar charge of corruption, in voting to allow another account, on the 16th day of December.

It is objected by the defendant's counsel, that the defendant was a judicial officer, and that the matters charged against him were judicial acts done in the performance of his judicial duty; and that as such they do not form the subject of indictment.

Supervisors are required to meet annually for the dispatch of business as a board; they may hold special meetings; and they have power to adjourn from time to time. The board of supervisors have power:

1. To make orders concerning the corporate property of the county, as they shall deem expedient.

2. To examine, settle and allow, all accounts chargeable to such county, and to direct the raising of such sums as may be necessary to defray the same (1 R. S. 366, §§ 1 and 4).

The authorities are uniform and consistent in showing the law to be, that no civil action can be maintained against the judges of the superior courts of general jurisdiction, for any act done by them in a judicial capacity (*Yates agt. Lansing*, 5 J. R. 282).

This rule embraces also all judges, justices and magistrates of inferior courts, acting judicially in a matter *within the scope of their jurisdiction* (*Broom on parties to actions*, 268, and cases hereinafter cited).

The rule also includes all officers charged with duties judicial in character, calling for the exercise of judgment and decision, acting within the scope of the authority conferred upon them; and the motive which influenced the particular act or decision, cannot be inquired into. (*Wilson agt. The Mayor of New York*, 1 Den. 599; *Weaver agt. Devendorf*, 3 Den. 115.)

It is also well settled that no prosecution by information

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or indictment, can be sustained against any judge of a superior court of record, for any act done by him as such judge. This rule does not apply to magistrates and justices of inferior courts, not of record, or other officers, authorized or required to perform special duties involving discretion, judgment and decision. Some of the authorities and cases consulted, will be here referred to, many of them cited by the learned counsel for the defendant in this case. I have already referred to *Yates agt. Lansing*.

It was a *civil action* against the chancellor to recover the penalty given by the *habeas corpus* act. KENT, Ch. J., delivered the decision of the court in an elaborate and instructive opinion, referring largely to the English authorities. *Greenvelt agt Burnwell*, reported in 12 *Mod. R.* 386, 1 *Salk.* 396, 1 *Lord Raym.* 457, is regarded as a leading case, in which HOLT, Ch. J., went largely into the law of judicial responsibility.

The case is more fully reported in *Raymond* than in *Salbeld*.

It was a civil action to recover damages for false imprisonment. The defendants were censors of the college of physicians in London, and were empowered, by act of parliament, to inspect, govern and censure practitioners of physic, so as to punish by fine and imprisonment. They convicted, fined and imprisoned the plaintiff. The chief justice held, and he seems through his opinion to have regarded it as essential, that the censors were "justices of record." He maintained that the record could not be traversed. The question of liability arose, as we have seen, in a *civil action*, and the court coming to the conclusion that the defendants were judges of record, empowered by act of parliament to judge, and to do what they had done, held they were not liable. The law now is, that no one acting in a judicial capacity, within the scope of his authority, is liable to respond in a *civil action*, whether the decision is evidenced by a record or not. The decisions in civil cases have no application to the present case.

Chief Justice HOLT, however, in his opinion, applies the

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same rule of irresponsibility to judges of the superior courts of record, in a suit by the king ; that is, a prosecution by presentment or indictment ; and he cites some cases to show that it had been held, that judges of courts of record, as a justice of oyer and terminer, were not answerable at the king's suit, before another judge. But there is nothing in the opinion of the eminent and learned judge, countenancing the position that all persons acting in a judicial capacity are exempt from prosecution by indictment.

In *Miller agt. Searl* (2 *Black. R.* 1145), DE GRAY, Chief Justice, lays down the rule in civil cases very clearly. He says : " In all cases where protection is given to the judge, giving an erroneous judgment, he must be acting *as judge*. The protection in regard to the superior courts, is absolute and universal ; with respect to the inferior, it is only while they act within their jurisdiction." This is the true distinction, at this day, in this state, as to the liability of judges and magistrates in civil cases.

LORD TENTERDEN, in *Garnett agt. Ferrand* (6 *Barn. & Cress.* 611), speaking of inferior justices acting within their jurisdictions, being called in question for errors of judgment, states the reason of the rule. " In the imperfection of human nature, it is better, even, that an individual should occasionally suffer wrong, than that the general course of justice should be impeded and fettered by constant and perpetual restraints and apprehensions on the part of those who are to administer it." He adds, " corruption is quite another matter. So, also, are neglect of duty and misconduct in office. For these, I trust, there is, and always will be, some due course of punishment by public prosecution."

The counsel for the defendant in that case, stated the law to be, that if a judge of the superior court acts *corruptly*, he may be proceeded against by *impeachment* ; if of the inferior courts, by indictment or criminal information.

Russell, in his *Treatise on Criminal Law* (vol. 1, 135, *et seq.*), educes from the cases the general rule : that the oppression and tyrannical partiality of judges, justices and other magistrates, in the admidistration, and under color of their

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offices, may be punished by impeachment in parliament, or by information or indictment, according to the rank of the offenders, and the circumstances of the offense. Thus, if a justice of the peace abuses the authority reposed in him by law, in order to gratify his malice, or to promote his private interest or ambition, he may be punished by indictment or information. If the justice has acted honestly and candidly, without oppression, malice, revenge or any bad view of ill intention whatever, though the act was illegal, the court will not punish him by the extraordinary course of an information, but will leave the party complaining to the ordinary method of prosecution by action or an indictment. The authorities cited fully sustain the text. (*See also The King agt. Barron*, 3 Barn. & Ald. 432.)

The question is not one of jurisdiction, nor is it confined to ministerial acts, but if the officer acts from dishonest, oppressive or corrupt motives, he may be indicted and punished. *Wharton* in his *American Criminal Law*, under the title of *Misconduct in Office* (§ 2514), states the law: "If a public officer, intrusted with definite powers to be exercised for the benefit of community, wickedly abuses or fraudulently exceeds them, he is punishable by indictment, though no injurious effects result to any individual from his misconduct."

The crime consists in the public example, in perverting those powers to the purpose of fraud and wrong, which were committed to him as instruments of benefit to the citizen, and of safety to public rights. Among other authorities he cites *The People agt. Coon* (15 Wend. 277), to show that a justice of the peace is indictable for misbehavior in his office, when he acts partially or oppressively, or from malice or corrupt motives. In that case *BRONSON, J.*, disposed of the objections that a justice could not be indicted for any act done by him as a justice, by saying that there was nothing in it; that whenever justices act partially or oppressively, from a malicious or corrupt motive, they may be punished criminally. He cites numerous authorities. (*See also The People agt. Dunton*, 2 J. Cas. note by *KENT, J.*)

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The act of the board of supervisors in examining, settling and allowing accounts chargeable to the county, is, I have no doubt, a judicial act, and the supervisors in exercising the powers conferred upon them by the statute in this regard, are not liable in any civil action, however erroneous or wrongful their determination may be ; and their decision is binding upon all parties concerned. (*Weaver agt. Devendorf, supra* ; *Chase agt. The County of Saratoga*, 33 Barb. 603 ; *The People agt. The Supervisors of Livingston*, 12 How. 204, S. C. ; 26 Barb. 118.) It is not necessary to multiply authorities.

In the present case the board of supervisors acted judicially in examining, settling and allowing Taylor's account. The supervisors acting as a board, were charged and intrusted with definite duties and powers, to be performed and exercised for the benefit of the community, and if they wickedly abused, or fraudulently exceeded these powers, they are punishable by indictment. If, in the language of this indictment, such supervisor acting as a member of the board, knowingly, corruptly, unlawfully and partially, votes that an account presented against the county as a county charge, be allowed and made a charge against the county, he is guilty of a misdemeanor, and may and should be indicted, tried, convicted and punished.

He has perverted the power conferred upon him for the public good, to purposes of fraud and wrong ; he has acted from corrupt motives, and he is not beyond the reach of punishment ; concurring in the sentiment expressed by Lord TENTERDEN, let us trust that there always will be some due course of punishment by prosecution, for corruption, neglect of duty or misconduct in office.

If there is no other objection to this conviction, it should stand, and the judgment upon it should follow.

It appears from the evidence that the annual meeting of the board of supervisors, commenced October 3, 1865 ; that it adjourned *sine die*, December 16 ; that on the 14th or 15th of December, Martin Taylor presented several bills and accounts against the "Erie county board of supervisors."

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They were very general, as thus : " To stationery furnished to October 1, \$1,277.40 ; to fifty gold pens and gold holders, \$900." They were examined and allowed, to the amount of \$5,130.81, the defendant voting for their allowance. The board was again convened, and was in session December 28th. The accounts were again brought before the board by Taylor, it having been alleged that there were some irregularities in the presentation and allowance of the accounts on the 15th December.

The objection was now taken by some of the supervisors that their power as a board was exhausted by the previous action. The defendant maintained the contrary, and the board so decided, and proceeded to examine and settle, and allow the account. The sum now allowed was \$3,921.81. The defendant voted for the allowance. Upon these facts appearing on the trial, the position was taken by the defendant's counsel that the defendant could not be convicted for his act of the 28th of December, for the reason that the board had no jurisdiction in the premises, having exhausted all its power by the action on the 16th. The district attorney insists, among other positions, as an answer to this position, that the action of the board on the 16th December, was without jurisdiction, and, therefore, void.

I have examined the statute referred to, and am satisfied that the board had jurisdiction of the account on the 16th December, and that the decision then made was binding upon the parties—Taylor and the county. But it does not, in my judgment, follow that the action of the board on the 28th December, was void for want of jurisdiction ; nor will it, in my opinion, if we should hold that the power of the board was spent by its action on the 16th December, follow that the defendant could not be convicted for his corrupt act in voting for the account on the 28th December.

It is undoubtedly a general rule, that a special power conferred upon officers or other persons, affecting the interests or rights of others, can only be exercised once. When the officers or body upon whom the power is conferred, have executed the power, the authority ceases, and the power

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becomes *functus officio*. It is this rule which the counsel for the defendant invokes. I think it is not applicable to this case. The only case cited, which may perhaps be fairly claimed as in point, is *The People agt. The Supervisors of Schenectady County* (35 Barb. 408). In this case Justice PORTER delivered an able and elaborate opinion. He has not entirely satisfied me that he properly applied the rule *functus officio* to the case. The board of supervisors on the 10th day of December, by a resolution, apportioned to the several towns and wards in the county, the amount of county charges that had been audited, according to the value of the real and personal estate in the towns, etc., as apportioned and equalized by them. The next day the board, by a resolution, reconsidered the resolution of the previous day, and by another resolution again apportioned and equalized the assessments of value in the towns and wards, upon a new and different basis. Each proceeding was strongly opposed, and each party moved for a mandamus to compel the board to perform the ministerial duty of attaching the warrants for the collection of the taxes. The court held, that the proceedings on the 10th December were valid, and that the board on that day exhausted its authority under the statute, and that it had no power to reconsider, review, revise and annul their own judicial action, when it had been once legally exercised. The parties who were interested in maintaining the proceedings of the 10th December, insisted upon their rights in the decision then made. I have looked into the authorities cited by the learned judge, and it may aid us in coming to a correct conclusion, to bring some of them into present view. In *Jermain agt. Waggener and others* (1 Hill, 279), the power of the canal commissioners, under the act, was special and restricted. It was exercised by an examination, surveys and estimates, and the adoption of a plan. After the work of construction had proceeded several years, the commissioners modified the plan in one particular, to the injury of the plaintiff when carried into effect. The court very properly applied the rule *functus officio*, remarking that the commissioners having once passed upon the question,

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their powers were at an end ; that their powers were *quasi* judicial ; that the adoption of a specific plan was but another name for the rendition of a judgment by a court of limited jurisdiction ; that such a step was, in its nature, irrevocable, and incapable of modification ; that it should, above all, be so held, after it had been acted upon, and purchases made, or other valuable interests acquired in reference to it.

Some of the cases referred to, relate to the action of courts or judicial officers, acting under special or limited powers ; some of them to the action of boards of supervisors under a special authority, as in the case of *The People agt. Ames* (19 How. 551). The board had authority, by statute, to limit the number of superintendents of the poor to one. The board exercised the authority, and reduced the number to one, and in a subsequent year voted to raise the number to three. It was held that the board had no power thus to restore the number to three.

The cases where the rule we are considering has been applied, are numerous, and Justice POTTER has cited many of them.

In all the cases, some right has been acquired by the decision, and the party beneficially interested has resisted any subsequent action of the court, officer or body authorized to decide, by which the party's interest should be changed or modified ; and the question has invariably arisen in considering such claim, and whether it has been affected by any subsequent action of the court, or officer or body authorized by the statute to decide, and in the absence of any authority to reconsider or revise the decision. I certainly doubt, as to the proper application of the principle in *The People agt. The Supervisors of Schenectady County*. It may be that when the board had once exercised the power of apportioning the tax as seemed to them equitable and just, under the power conferred by the act of 1838 (*ch.* 314, § 1), that the power was at an end. The power was in its nature judicial, and the act of apportionment was a decision in which each town and ward was interested. It is, nevertheless, a stringent application of the rule *functus officio* to say that the board,

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during the same sitting, cannot reconsider its action. The meeting of the supervisors is "for the dispatch of business as a board." It is agreed that some of their powers are legislative, some ministerial, and some judicial or *quasi* judicial. I agree that the power to examine, settle and allow accounts, is in its nature judicial, and that parties interested are bound by the decision in all cases calling for the exercise of judgment and discretion; but, in my opinion, the same board of supervisors may re-examine an account once passed upon, and, in fact, reject it, or reduce the amount first allowed. The claimant acquires no fixed right until the final action of the board upon his claim; and until he has received the order for the payment of his claim, the board has jurisdiction over it.

Such, I understand, has been the constant practice of boards of supervisors. Suppose an account has been allowed, and the same board becomes satisfied that it has no foundation in justice; that it should not have been allowed, or only a part of it; can it be that this same body, met for the dispatch of business, cannot reconsider their act, and do justice between the claimant and the county. If they cannot reconsider their decisions touching accounts, then the disallowance of an account must be final. Having acted once upon the account, that is the end of the matter, and no subsequent board can examine and allow it. It is to be observed that the power "to examine, settle and allow accounts chargeable against the county," is very general. It is a power in constant exercise by the board during its meeting. The exercise of it constitutes the principal business of the board. The meeting may, and usually does, continue for weeks. These accounts are usually referred to committees, charged with the duty of examining them, and reporting upon them. The accounts against the county must be passed upon, and the aggregate of the accounts allowed be ascertained, before the board can, with proper intelligence, "direct the raising of the sums necessary to defray the same."

We are clearly of the opinion that the action of the board

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of supervisors touching the examination, settlement and allowance of accounts against the county, is under the control of the board during its meetings for the dispatch of business as a board, and that it may revise and correct its proceedings, and that it is the final action of the board that is binding upon the parties claimant and the county. Arbitrators have full control over the award until it is published. (*Russ. Arb.* 237; *see as to a referee in a civil action, Ayrault agt. Sackett*, 17 *How. Pr. Rep.* 507.)

If we should come to the conclusion that the action of the board on the 16th December, upon Taylor's account was final, and that the board had no jurisdiction to re-examine it, we should still be of the opinion that the defendant could be properly convicted for his corrupt act on the 28th December.

What is this case? The defendant was a supervisor—an officer charged with duties and trusts, and clothed with powers of great importance to the public. In executing those duties and powers he acts corruptly. He is faithless to his trust. He unites in acts tending to defraud the public, and by which the public is defrauded. He acts *as a supervisor*. When arraigned for his corrupt acts, can he be heard to say, true, my acts were unlawful, partial and corrupt, and I was acting in my official capacity as supervisor, but the body of which I was a member, composed of supervisors like myself, and acting as such, had no jurisdiction in the matter upon which we acted, because it had by its previous action of the like character, not mentioned in the indictment, exhausted its authority! Taylor submitted the account on the 28th December, and the board again took it up and acted upon it, having first decided that it had jurisdiction. There is no law or reason for the position that the supervisors were not liable for their corrupt acts on the 28th December. The crime consists in acting corruptly as supervisors—official corruption—misconduct in office. It is not essential that the board or officer should have jurisdiction of the subject matter upon which it or he acts. If the officer wick-

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edly abuses, or fraudulently exceeds his powers, he is punishable by indictment.

It is not essential that any injurious effects should result to individuals from the misconduct of the officer (*Wharton's Am. Cr. L.* 2514).

If the board of supervisors act without jurisdiction, their decision will not be binding upon the parties intended to be affected by the act. (*Chemung Canal Bank agt. The Board of Supervisors of Chemung*, 5 Den. 517. *The People agt. Lawrence*, 6 Hill, 244.) But the fact that the board exceeded its powers, will constitute no defense for the supervisor, whose act as supervisor proceeded from corrupt and wicked motives. We think the defendant was properly convicted under the two first counts in the indictment, assuming that they are to be limited and confined to his act on the 28th December. But why so limit these counts? The proof on the trial showed the votes of the defendant on the 16th December, when Taylor's accounts were first examined, settled and allowed, at an amount larger than was allowed on the 28th December. No question is made as to jurisdiction on the 16th December. Why not refer these counts to the act of the defendant on the 16th instead of the 28th December? It is a rule that time and place, when and where the crime was committed, must be stated with certainty in the indictment, but it is not necessary to prove them on the trial as stated, unless they are necessary ingredients in the offense (*Arch. Cr. Pl.* 40, 41). In this case it was not material whether the crime was committed on the 28th or 16th December, nor was the amount of the account as allowed material. In short, the evidence of the defendant's act on the 16th December, proved every material averment in the two first counts.

Again, there was a third count, charging the like corruption in voting on the 16th December, in favor of an account presented by John McNamara, for spirituous liquors furnished to the supervisors. The verdict is guilty of the offense charged in the indictment. This is a general verdict of guilty. The rule is, that when one count in the indictment

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is good, and the verdict is guilty, the conviction is to stand.
(See *Gunther* agt. *The People*, 24 N. Y. R. 100.)

There was no error committed upon the trial, and the conviction must stand.

COURT OF APPEALS.

MARTHA ERNST, Executrix of HENRY ERNST, decased, appellant agt. THE HUDSON RIVER RAILROAD Co., respondents.

If a traveller in crossing a *railroad*, is warned of the approach of an engine by the customary signals, or *if by other means*, he is made aware of its proximity, it is his duty to avoid exposing himself to injury.

If he advances on the open highway, with no cars in view, and no indication of their approach, either by signal or otherwise, he is at liberty to pursue his way without incurring the imputation of breach of duty to a wrong-doer.

The only condition of the right to redress for a wrong of this description is, that the party aggrieved be *free from culpable negligence*; and he is not chargeable with such negligence, unless he fails to exercise *ordinary care and vigilance*, to avoid the injury of which he complains.

Ordinary care, skill and diligence, is such a degree of care as men of ordinary prudence, under similar circumstances usually employ.

The *degree of care* which men of common prudence would be likely to observe in a given case, must be determined with reference to *all the attendant circumstances*.

The citizen who, on a public highway, approaches a railway track, and can neither see nor hear any indication of a moving train, is not chargeable in law with negligence, for assuming that there is no car sufficiently near to make the crossing dangerous.

In this case *held*: that the defendants not only misled the plaintiff's testator by not exhibiting the *flag* at the crossing of the railroad, in accordance with the uniform custom when an engine was near, but also by approaching the highway *illegally*, neither *sounding the whistle* or *ringing the bell* as they advanced. This was an act in open defiance of the public statute enacted for the protection of the traveller.

It is not the policy of the law to favor those who deliberately violate its mandates, nor is it the duty of the courts to invent excuses for wrong-doers, or to palliate the guilt of reckless homicide. Our statutes for the protection of life are to be obeyed, and when they are broken and defied, responsibility is not to be evaded by imputing blame without proof, to him who suffers death, for the sake of shielding those who inflict it.

It is not true that a traveller on a public thoroughfare is guilty of culpable negligence, as matter of law, if he does not stop to listen, or *look up and down the track* before he goes over a crossing of a railroad.* Whether such an omission is culpable, depends upon the facts and circumstances of each particular case.

*NOTE.—This decision directly negatives the same affirmative proposition laid

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March Term, 1866.

APPEAL from judgment of supreme court in the third judicial district, sustaining a non-suit on the trial at the Rensselaer circuit.

The action was brought by the plaintiff as the widow and executrix of the testator, for damages sustained by killing her husband at the village of Bath, on the 29th day of December, 1855.

The suit was commenced in 1856. The first trial was before Mr. Justice GOULD, who non-suited the plaintiff. The case was heard at the general term, before Judges HOGGBOOM, PECKHAM and GOULD. The non-suit was set aside, and

down in this case when it was before this court on a former occasion (24 How. 97).

This important question, therefore, has been viewed and decided differently by this court, by the opinions of two of the judges of eminent learning and ability, and each particularly noted for his close legal precision. It may not, therefore, be considered entirely presumption, in view of this difference, to look briefly at the question in comparing these decisions. In 24 How., it is laid down as a matter of law, that "in the judgment and opinion of a majority of men, *common prudence forbids* the attempt by any person to cross the track of a railroad in constant use, without first taking the precaution to *look both ways* upon the track, and see and ascertain that a train is not approaching in either direction; and the omission to do so is *per se*, gross negligence, in view of the danger to be avoided, and the fatal consequences involved in any accident resulting from such omission." This proposition is pretty fully discussed in the opinion of the judge.

In the present case, this legal proposition is alleged to be untrue, as matter of law; and it is decided that "whether such an omission is culpable, depends upon the *facts and circumstances* of each particular case." Previously, however, the learned judge in this case, has laid down a proposition as *matter of law*, that "the citizen who, on a public highway, approaches a railway track, and can neither *see nor hear* any indication of a moving train, is not chargeable in law with negligence, for assuming that there is no car sufficiently near to make the crossing dangerous." Here, it would seem, is the very *condition precedent* required to exculpate from culpable negligence, which is expressed in this case in 24 How. For the converse of this proposition must be true, that if the citizen *can see and hear* any indication of a moving train, he is chargeable in law with negligence, if he undertakes to cross when there is danger. Whether, therefore, there is danger or not, is ascertained by seeing and hearing. And this *seeing and hearing* is unqualified and unlimited in its application; it very properly takes the widest range of vision and sound—consequently must include a view of the track both ways—up and down. But the proposition stated in 24 How., is said to be in direct conflict with repeated adjudications in this and in other courts; a few cases are referred to as sustaining this view; and without going into any elaborate reasoning why it should be considered a question of *fact* and not of law, it seems to be considered *res adjudicata*. As this case seems to be the battle ground upon which this question is fought, and as it will in all probability come before this court again, it may not be considered finally settled.—REP.

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a new trial was granted; the opinion of the court being delivered by Judge HOGEBROOM, and GOULD, J., dissenting (32 Barb. 159).

The second trial before Judge HOGEBROOM, in February, 1861, resulted in a verdict for the plaintiff; a motion for a new trial, on the ground that the verdict was against evidence, was made and denied at the special term. An appeal was taken from the judgment as well as the order, and heard on a case and exceptions before Judges WRIGHT, HOGEBROOM and GOULD. Both were affirmed at the general term, the opinion of the court being delivered by Judge WRIGHT, and GOULD, J., dissenting.

The defendant appealed, and a new trial was granted here by a divided court. An imperfect and erroneous report of the case will be found in 24 *How. Pr. Rep.*, 97.

On the last trial in November, 1865, the plaintiff was non-suited, and the judgment was affirmed *pro forma* in the court below.

The facts were much more fully developed than on the previous trial, and material additional evidence was given to repel the proof relied on by the defendant to impute negligence to plaintiff's testator. At the close of the evidence, a motion was made for a non-suit, which was granted in deference to views supposed from the head notes of the case, as reported in 24 *Howard*, to have received the sanction of this court.

The plaintiff having been non-suited, the truth of such facts as he proved by disinterested and credible witnesses, is to be assumed, without reference to contradictory evidence by the defendant; and the material facts thus established are as follows:

The testator resided in the county of Rensselaer, about fifteen miles from the city of Albany, which was his market town. His family consisted of his wife and six daughters. He was about forty-five years of age. He was an active and industrious man. His health was good; his habits were regular, and his vision clear. He was accustomed to the use of horses, and had been a teamster on the road from Sand

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Lake to Albany, for twenty-five years. He was familiar with the ferry, the railroad, the signals, the station and the locality.

The crossing at which he was killed is in the village of Bath, near the river side. He was driving down Rensselaer street to the ferry landing, for the purpose of crossing to Albany. The railroad intersects that street at right angles. The highway he was travelling, and the ferry to which he was bound, had been used as such for more than half a century; and this was the point of convergence of the principal thoroughfares of Rensselaer, and the usual route of travel to Albany, by the ferry connecting this city with the village of Bath. Next east of the railway track is Broadway, a street sixty feet wide, which crosses Rensselaer street at right angles, being parallel with the river. On the south-east corner of these two streets is Dearstyne's hotel, at which the testator, having rode some fifteen miles, stopped to warm before crossing the ferry, the morning being very cold. Vandenburg, whose team was in front of his, stopped at the store, and on coming out drove down to the ferry boat. On looking back he saw Ernst get into his sleigh, turn his team and drive down toward the boat. This was a little before ten o'clock in the morning.

The distance from Dearstyne's hotel to the railroad track was one hundred and twelve and a half feet, and about one hundred feet from there to the ferry landing. The descent from the hotel to the track was moderate, but from there to the ferry it was steep. Rensselaer street, like Broadway, was sixty feet wide. The station house was on the north side of Broadway, where it obstructed the view of the traveler as he approached near the track. After Ernst was killed it was removed to the appropriate place on the opposite side, where it does not hide the approach of an engine. The railroad track approaches the crossing from the north on a curved line, running on a level below the upland, and near the river side. There is an ice house on the river side of the track, which is thirty-six rods or five hundred and ninety-four feet north of the crossing; from that point there is a

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sharp curve in the road to the north-east. There is no point in Rensselaer street, from Dearstyne's down to the station house, where a man standing erect, and looking directly north, could see an approaching train before it reached the ice house. The only point at which it is possible to see this distance, is just before reaching the station. The elevated land between Rensselaer street and the ice house, and an intermediate park of trees, intercept the sound of an approaching train, and limit the range of vision. The ground within a hundred and fifty feet north of Rensselaer street, is twelve feet higher than the level of the streets and railroad, and there the park commences, still further obstructing the northern view.

Ernst, when he stopped, had driven his horses round the front of Dearstyne's hotel in Broadway, and in turning them round to resume his way, in Rensselaer street, he necessarily faced to the north, and had a full and open view of the track for twenty rods north of the crossing, which was the limit of the range of vision, not only at the intersection of Rensselaer street and Broadway, but also for a considerable distance westward toward the crossing.

As he looked north, at this, the natural point of observation, there was no train in view, and as he looked west, he saw that there was no flagman. Starting at first on a walk, his horses then took a slow trot, which they kept until they were near the station house. The ferry boat was about starting, when Simmons, who was standing near the crossing, seeing Ernst driving down, hailed to the ferryman to wait for him. Simmons then beckoned to Ernst to hurry on, as the boat was waiting for him. Signals were also made to him from the boat to come on. He started up his horses to a brisk trot, and just as they were within two or three rods of the track, in full motion, the engine emerged from behind the station house, and simultaneously with the rush of the advancing train, Rouse, an old man who happened to be standing on the station platform, and Hunter, who stood on the stoop of the store on the south side of the street, halloed to him from opposite directions; and the frightened

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horses plunged southward on the track, when the team was knocked down by the engine, and Ernst received the blow of which he died. The defendant's fireman admits that he saw the testator attempting ineffectually to keep back his horses.

It was proved that this was a station for a flagman, and that it was, and long had been, the uniform practice of the company, known to and relied on by those who traveled the road, to give warning when a train was sufficiently near to make the crossing dangerous, by having a flagman on the middle of the track, holding up a white flag if the train was to stop, and a red flag if it was to pass without stopping.

Four witnesses for the plaintiff, who saw the whole transaction, and who knew Miller, the flagman, swore that he was not there, and that no flag was there. Of the defendant's witnesses, Hunter and the engineer both swore that there was no flagman. The fireman testified that there was one, and that he saw him waving his flag, but he was impeached by his own oath before the coroner's jury, when he swore positively that he saw no flag.

The bell was not rung, nor the whistle sounded, as the train approached the crossing. It is true that the engineer and fireman, who were the immediate actors in causing the death of Ernst, claimed that they gave the signals; but the trackman did not confirm their statement, and the conductor frankly admitted that he was in the baggage car, where he could have heard the bell if it had been rung; that he was in the habit of noticing signals; that he could not say the bell was rung, and that the first he heard of the whistle was when it was blown to apply the brakes at the point of collision. The defendant's witness, Hunter, who was standing within thirty-five feet of the crossing, unoccupied, and looking up the track, admits that he discovered the approach of the engine when it was within about a hundred and sixty feet of the crossing, and that he heard no signal, either by bell or whistle. The engineer himself admits, when sworn at the inquest over the body of Ernst, that the bell might not have been ringing when they came to the crossing.

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Dearstyne, the ferryman, standing on the boat at the landing, on the lookout for signals, swears that they neither rung the bell nor sounded the whistle until after the collision, when they began to do both immediately; that he had observed the omission in some previous instances, being on the look-out for passengers by stopping trains; that he heard their approach when they got within three hundred feet of the crossing, where he could not see them by reason of intervening buildings; that his attention was drawn to it at the time, by hearing the cars before he saw them, and that the bell was not ringing when the train came in sight.

Brown, who was drawing gravel at the ice house, thirty-six rods above the crossing, testified, that they neither blew the whistle nor rang the bell, as they approached the crossing; that his attention was drawn to the fact particularly at the time; that he had occasion to drive across the track just at the corner of the ice house, another gravel team having crossed the track just before him; that just as his horses were across the track and his wagon on it, this train suddenly appeared within less than a hundred feet of him; that until then he neither saw it nor heard its approach; that the train passed on, while he and the other teamster were speaking of the omission of the signal; and that within half an hour after he went to the crossing to water his horse, and there heard of the collision by which Ernst was killed.

Ten Eyck, who was at the store, and within some thirty or forty feet of the crossing, unoccupied and looking up the track, testified that the bell was not rung nor the whistle sounded until after the collision, and that they then began to do both; that he noticed the fact at the time, and that when he discovered the cars, they were within about ninety feet of the crossing, and he saw Ernst driving up to the track, and Hunter making motions to him, immediately before the collision.

Taylor and Traver both testify, that they heard no signal until after the collision; and that immediately after it the whistle was sounded and the bell was rung.

It was a very light train, only two cars being attached to

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the locomotive, one a baggage and the other a passenger car. Two witnesses gave estimates widely different from each other, as to the distance a train might be heard by one listening for the sound. One thought it might be heard one or two miles, and the other thought it would not be audible when the whistle would be at a distance of seven or eight rods.

The fact is undisputed, that the approach of this particular train was so noiseless, from the rapidity of its motion against the wind, the elevation of the intervening upland, the obstruction of trees and buildings, or the prevalence of other sounds, in a busy and populous neighborhood, that even the ferryman who was upon the look-out, did not detect it until it was within three hundred feet of the crossing ; and Taylor, Traver, Ten Eyck and Vandenburg, all in the immediate vicinity, could not and did not, hear it at all, until they saw it rushing out from behind the station house, immediately before the collision. Brown testifies that its approach was so imperceptible, that it was not noticed by him or his horses when he drove them across the track, though it was then within less than a hundred feet of him. It was also proved that there were four railroads in the immediate vicinity, so that the noise of cars in the absence of signals, did not indicate their presence on that road.

The cars were moving with great velocity, and Dearstyne, the ferryman, who waited for the trains, and knew the times at which they were due, observed at the time that they were not passing at the regular hour. The proof was decisive that the speed of the cars at the crossing was greater than usual, and that they were going from thirty-five to forty miles an hour. Of the inculpated employees of the defendant, the engineer claimed that they had been going only at the rate of about twenty-five miles an hour, and the firemen, that they were going only at the rate of ten or fifteen miles an hour ; but both admitted that on reversing the engine and applying the brakes, they were unable to stop the engine until they reached the cattle guard, which was proved to be some nine hundred feet below the crossing, though they

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represented it as less than half that distance. It was proved by Mr. Squires, an experienced railroad conductor (and the fact was undisputed), that if they had been going only at that rate, with the light train they had, the reversing of the engine and application of the brakes would have stopped the cars in fifty feet, being one eighteenth part of the distance they ran after the collision.

The fact that Ernst, when he turned his horses round from Broadway into Rensselaer, faced and looked north in the direction of the track as far as it was within the range of vision, was proved and undisputed. The range at that point was some twenty rods north of the crossing. He was one hundred and twelve and a half feet from the crossing when he started, and assuming the testimony of defendant's witnesses to be true, he was advancing at the rate of about six feet per second, and nineteen seconds would bring him to the crossing. If the speed of the engine was thirty-five miles an hour, it was advancing at the rate of about three rods a second, or three rods and a half a second, if its speed was forty miles an hour. Assuming that it was coming only at the rate of thirty-five miles an hour, the engine, when he started nineteen seconds before the collision, was fifty-seven rods north of the crossing, and twenty-one rods north of the ice house on the sharp curve beyond the uplands, and far beyond the range of vision.

The witnesses could not testify whether he did or did not afterwards turn his head again to the north, in the few seconds that intervened. There was no point where, even if he had been standing erect, he could have seen the track beyond the ice house, which was within five hundred and ninety-four feet of the crossing. But he was on a lumber sleigh without the box, and as usual in such cases, he was sitting on the bottom of the sleigh. No proof was given as to the extent to which this reduced the range of vision. It was proved that in riding west it was not necessary to turn the head to see the track above the crossing, within the probable limits of his view in that position. There was no evidence that he did not look to the north repeatedly on the

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way down, unless it be inferrible from the fact that there was no sound or signal to call for a repetition of the precaution, and the further fact that they were beckoning to him in front to come on to the boat, and that he was approaching a steep descent, which required his attention to his horses. Whether he looked north again or not, the evidence clearly shows that he could not have seen the engine in time to avoid the collision ; for it is proved by the defendant's witnesses, that neither of the three men at the lookout in front of the engine, saw either him or his team, until the very instant before the collision.

He had a handkerchief tied around his neck, as usual in very cold weather.

Hunter was called by the defendant, to prove that as he was standing some thirty-five feet from the crossing, and Ernst was passing him on a brisk trot, called to him to hold on. Hunter admits that he was himself excited and frightened, the cars being then close to the crossing, and that Ernst did not appear to hear him.

This evidence was met by proof that Taylor and Dearstyne, who were facing Hunter, which Ernst was not, did not hear him ; that Ten Eyck, who was in front of the same store, and within a few feet of Hunter, did not hear him, though he saw him motioning with his hand, and that at the moment of Hunter's warning, Ernst was just driving on the track, and the engine rushing within sixty feet of him.

Tator, a trackman of the defendant, who claimed to have been lounging at ten o'clock in the morning in the passenger room, was also called to prove that while Hunter was endeavoring to attract Ernst's attention on one side, he was hallooing from the other, and the flagman warning him back from the crossing. He admits that Ernst was then within fifteen feet of the track, but it was proved by the witnesses that his statement as to the main fact was utterly untrue.

The proof was clear that motions were made by Simmons, Hunter and Rouse ; that those who saw the motions of Simmons, who alone was in front of Ernst, understood them as beckoning him on to the ferry boat, which was waiting ;

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that those who heard the halloo of Hunter, and saw his motions, and those of Rouse, which Ernst probably did not, were in doubt until the engine appeared, whether they were beckoning him to go forward or to go back.

The proof was equally clear, that the warnings, if heard and seen by Ernst, were too late; that the horses were in full motion, and within fifteen feet of the track; that they were frightened, and plunged southward on the ties, and that Ernst ineffectually tried to pull them back.

It was proved that Gregory, who acted as engineer, was a boy who described himself as some eighteen years of age, when he ran over Ernst, and who had shortly before been taken from work in a machine shop, to act as engineer on the defendant's road. It appeared that he and Porter, the fireman, were the same employees who had run over and killed another traveler some two months before in the city of Troy.

Their testimony, and that of the trackman, was discredited by the other evidence in the case given by disinterested witnesses.

The trackman, among other things, swore that the flagman was at the crossing, a fact which is disproved on all hands; that Ernst was within thirty feet of the track, and driving ten miles an hour when the train was at the ice house, five hundred and ninety-four feet above; that driving at that rate, he stopped them directly on the track, and they remained there standing still on the track for a minute, waiting until the engine came down and struck them.

The engineer swore that it was a local train at the usual time, a fact as to which he was flatly contradicted; that he blew the whistle eighty rods from the crossing, and that the bell was rung continually from that point down to Rensselaer street; a fact on which he is confirmed neither by the conductor nor the trackman, and on which he is contradicted by Hunter and Vandenburg, two of the witnesses for the defendant, as well as by Taylor, Traver, Dearstyne and Brown. He swore before the coroner's jury that he saw the flagman motion to Ernst to stop, and on the last trial

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he admitted the statement was false. He swore on the inquest that after the warning by the flagman, Ernst urged his horses faster with rein or whip; and on the last trial admitted the fact to be untrue, and swore that he did not see the team of Ernst at all until after the collision.

The fireman testified, among other things, that the whistle was blown more than eighty rods above the crossing; that the bell was ringing all the way down, and that when the engine was at the ice house, he saw Rouse motioning with a flag. He was contradicted by his own oath before the coroner's jury, where he swore that he saw no flag. He admitted on the last trial that he did not see the testator's team until after the collision, though he swore on the inquest that he did.

Seven witnesses were sworn on behalf of the plaintiff on the last trial, who were not in attendance on the previous trial, and they testified to material facts tending to discredit and rebut the facts before proved by the defendant, and relied on to inculcate the testator as guilty of negligence.

The defendant neither produced, nor gave any excuse for the non-production of Simmons, Butler and Waltemyre, their three principal witnesses on the former trial, and on whose testimony mainly, as appears clearly from the prevailing opinion, the new trial was ordered when the cause was before this court on a former occasion. Ostrander, who was erroneously represented in the report of the case in 24 *How.*, 99, as swearing on the trial then under review in this court, to material facts inculcating the deceased, was not sworn at all, either on that or on the last trial. The entire statement there prefixed to the opinion, was evidently made substantially from the report of the review in the supreme court of a previous trial, in which the plaintiff was non-suited. (32 *Barb.* 159; 19 *How.* 205.) The review in this court was of the second trial, in which the plaintiff recovered.

Proof was offered in behalf of the plaintiff of the dying declaration of the testator, that he had no warning of the approach of the train, but on the objection of the defendant it was rejected.

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R. A. PARMENTER, *for appellant.*

J. H. REYNOLDS, *for respondent.*

PORTER, J. When this case was here on a former occasion, a new trial was granted on the ground that a non-suit had been refused, upon a state of facts, of the truth of which there is now no pretense. That decision is unreported in the regular series; but one of the opinions delivered in this court is contained in another law publication (24 *How. Pr. Rep.* 97). In that report, through some misapprehension or oversight, the head note, as well as the preliminary statements of facts, are erroneous. The body of the opinion, however, discloses a very striking difference in the evidence as then and as now presented, on the vital question, whether the husband of the plaintiff was chargeable with negligence, and a guilty participation with the defendant in the wrong which resulted in his death. We find the difference still more marked, on examining the printed cases upon which the decision of this court was founded.

It seems that the plaintiff was surprised on the trial by proof which she probably had no reason to expect, but which it was not thought proper to repeat on the last trial, when she was prepared with evidence to meet it. The prevailing opinion assumes—and we are at liberty, and perhaps bound to suppose, that the testimony of Simmons, Butler and Waltemyre, whom the defendant did not call on the last trial, justified the assumption—that Ernst was intoxicated on the occasion of the collision; that he drove so carelessly by the way that he was partially deprived of the use of his ordinary faculties; that he knew the stated times for the passage of the trains; that this was in fact a regular train, on its stated and customary time; that it was notoriously due at that hour; that Dearstyne's hotel, at which Ernst stopped, was one hundred and fifty feet east of the track; that he started from there at a rapid rate of speed; that other persons heard the train coming at quite a distance; that *four* of them, after he started from the tavern, respectively called to him in a loud voice *to stop*, several times each; that quite

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a number of persons saw the train approaching, and that he had an open view of it nearly all the way from the hotel to the crossing, for a distance of a hundred rods from the highway on which he was riding (24 *How.* 102, 108, 110).

In the light of the evidence given on the last trial, it is not difficult to infer why testimony like this was not reproduced when the plaintiff was prepared to meet it. Simmons, one of these witnesses, swore to a box on the testator's sleigh, and a seat on the box; represented in substance that the intoxicated man who had been running his horses and drinking at every tavern, had his head as well as face bundled up in a big shawl; that he himself heard the cars coming, and standing near the track, and face to face with Ernst, when the latter was half way down from the tavern, told him to stop for God's sake, or he would be killed. It appears that Butler on that occasion swore with equal zeal. His version of the matter in substance was, that he stood on the north-west corner of Broadway and Rensselaer streets; that he hallooed from there to Ernst as he was passing, to hold on; that the testator appeared to hear him, but turned his head away, and in defiance of the warning, drove on to the crossing. Waltemyre, on that trial, went further still, and in effect represented Ernst as driving his horses on the track directly in front of the engine, though warned of its approach by the whistle, the bell and the flagman.

The testimony of these three men then given, and now withheld, explains the former decision, that upon such a state of facts the plaintiff should have been non-suited. It also explains why that decision was by a divided court. Such testimony, though not met by a point blank contradiction, was too improbable with the other facts proved, either to obtain credence with the jury, or to commend itself to the full confidence of practiced jurists. It happened that the case upon the testimony as then given, was heard in this court and the court below, by ten of the judges, only five of whom differed in their conclusions on the question of fact from the jury. It is scarcely to be supposed that they would have hesitated to approve the verdict if it had been upon

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the proof presented by the respective parties on the subsequent trial.

It now appears that the prominent facts then relied on to inculcate the testator, were fictitious. Instead of being a drunkard, stupified and crazed with liquor, he is proved to have been an orderly, sober and respectable citizen. The pretence that he drank any where that morning is abandoned, and his family physician testifies that he never knew him to be intoxicated. Instead of being deprived of the use of his faculties, he is shown to have been a man in the prime of life, of regular habits, with clear vision and in perfect health. Instead of running his horses by the way, and starting from the tavern with reckless speed, he is shown to have been an experienced and practiced driver; and it is proved that on this occasion he started from the hotel on a walk, and continued to drive with moderation, prudence and judgment. The claim that he knew the stated times of the trains, is also abandoned. The fact that this was a regular train, on its customary time, is alleged by none even of the defendant's witnesses except Gregory, the engineer, and he is flatly contradicted by Dearstyne, an intelligent and disinterested witness, who knew the time of the trains, waited for them with his ferry boat, and observed the fact at the time, that this was a train not then due. The defendant knowing the fact to be in issue, neither produced its table, nor confirmed Gregory's statement by the testimony of any of its other engineers. The absence of the flagman from his post, is strong presumptive evidence that no train was due at that hour. Under such circumstances, no court has a right to assume, as matter of law, that the statement of the inculcated and impeached engineer is true, and that the contradictory testimony of a reliable and disinterested witness is false.

It now appears that instead of the testator riding a hundred and fifty feet in full view of the engine, the whole distance from the hotel to the track is less than a hundred and thirteen feet, and that he did not see the engine at all until it emerged from behind the station house, when the horses were in the very act of going upon the crossing. It also

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appears, that instead of his having from the hotel down, except opposite the station house, an open view of the northern track for a hundred rods, there was not one place in the whole distance, where, even if he had been standing up and expecting the train, he could have seen it as far north as the ice house, which was within five hundred and ninety-four feet of the crossing. The track instead of being straight, was sharply curved. The view, instead of being open, was obstructed by intervening woods and upland. The natural point of observation, when there was no signal of an approaching train, would be at the corner of Rensselaer street, as he turned his horses to the north and drove into it from Broadway. The proof is explicit, that from that point the range of vision is but about twenty rods, and it is equally decisive that when he was at that point the engine was behind the hill and woodland, at least fifty-seven rods above the crossing. Ernst, as he drove down, was sitting on the bottom of his sleigh, which had no box. This of course naturally narrowed his range of vision, and made even an intermediate fence an additional obstruction to the view.

There was no pretense now that any one east of the store which adjoins the track, either saw or heard the train at all, until it reached the crossing. Ten Eyck and Hunter were at the store, within two or three rods of the rails. Both of them were looking north, and both unoccupied, yet neither of them saw or heard the engine until it was within less than two hundred feet of them ; the horses of Ernst being then close to the track, and in full motion. It was not seen at all by the witnesses Taylor, Traver, Dearstyne and Vandenburg, until just before it reached the crossing, and none of them heard it until then, except the ferryman, who was more familiar with the sound, and who detected it first while looking in that direction from below on the river, when the cars were within three hundred feet. The claim that four men were hallooing to Ernst to stop, when he was not yet half way down, is also now abandoned. But two men hallooed at all ; one from the store, and one from the station house, while the train was passing between them. If Ernst heard what

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either of them said, the fact is undisputed that no one else did. The warning was well meant, but it came too late. It was simultaneous with the *res gesta*, with the rush of the engine, the plunge of the horses, and the ineffectual struggle of the testator to rein them back.

The proof is clear and decisive that the bell was not rung nor the whistle blown, until after the collision. Only two of the defendant's witnesses claim that they were, and they were the two employees whose neglect of that duty cost Ernst his life. One of them was a mere boy. Both were impeached on material points, by their own oaths before the coroner's jury. They had officiated some two months before as engineer and fireman when Wilds was killed. They were specifically contradicted as to the whistle and the bell, by two of the defendant's and five of the plaintiff's witnesses, and they were confirmed by nobody. On the last trial it also appeared that this was a flag station; that it was the known and uniform practice of the company, whenever there was a train advancing within eighty rods of the crossing on either side, to give notice to the public of its approach by exhibiting at that point a white flag if the engine was to stop, and a red flag if it was to pass without stopping. There was neither flag nor flagman at the crossing; and thus the practice, which was adopted for the security of the traveler, was converted on this occasion into a snare for his destruction. On this state of facts, there was nothing to justify the imputation of culpable negligence to the testator; and most manifestly there was nothing to warrant a court in adjudging his guilt as matter of law, without the intervention of a jury.

In reviewing the propriety of the non-suit, we are legally bound to assume the truth of the facts which the testimony of the plaintiff legitimately conduced to prove, though their correctness be controverted by the defendant's witnesses (*Colgrave agt. The New Haven and Harlem Railroad Co.* 20 N. Y. R. 110). It is the appropriate province of the jury to deduce inferences of fact, and to weigh doubtful or conflicting evidence.

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The testator was lawfully upon the public highway. The right he had to use it was as perfect as that of the defendant to cross it. In the exercise of his legal privilege, he did not expose others to injury, and was charged with no duty of extraordinary vigilance. The defendants exercised theirs with agencies imminently perilous to human life, and they were under a correlative obligation to use them with the highest degree of care. As the highway was never dangerous, except when they made it so by driving their engines across it, and as they never crossed it without some degree of jeopardy to the wayfarer, the law provided for the security and protection of the citizen, by requiring the defendants to give special and public warning whenever their engines approached the crossing.

The rights of the people of Rensselaer in their own highways, are not subordinate to those of the railroad company. If the traveler is warned of the approach of an engine by the customary signals, or if by other means he is made aware of its proximity, it is his duty to avoid exposing himself to injury. If he advances on the open highway, with no cars in view, and no indication of their approach, either by signal or otherwise, he is at liberty to pursue his way without incurring the imputation of breach of duty to a wrong-doer.

The only condition of the right to redress for a wrong of this description is, that the party aggrieved be free from culpable negligence; and he is not chargeable with such negligence, unless he fails to exercise ordinary care and vigilance to avoid the injury of which he complains. There has been some diversity of judicial opinion as to what ordinary care and vigilance demand of a party upon a given state of facts; but that this is the uniform standard by which to test the right of the plaintiff has been too often adjudged to be open to further discussion.

The rule is simple, practical and easy of application. "The question is," as this court said, when this case was before it on a former occasion, "what would a majority of men of common intelligence have done under like circum-

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stances?" (24 How. 108.) "Ordinary care, skill and diligence, is such a degree of care as men of ordinary prudence, under similar circumstances usually employ" (*Brown* agt. *Lynn*, 31 Penn. 512).

The degree of care which men of common prudence would be likely to observe in a given case, must be determined with reference to all the attendant circumstances. An injury by an engine *in motion*, would necessarily be of a grave and serious character; but at a distance of eighty rods from the crossing, it would be as harmless to the wayfarer as the rail over which he drives. It is not unusual in argument to confound the seriousness of such an injury, when it occurs, with the probability of its occurrence, and to assume that the same degree of vigilance is demanded when the engine is not within the range of sound or vision, as when it is seen in close proximity, or public warning is given of its approach.

The measure of precaution which ordinary prudence suggests, is proportioned to the probability of danger. When a train is seen or known to be close at hand, a discreet man would stop until the danger is past; but to stand waiting in front of a public crossing, with no reason to believe that there is an engine within a quarter of a mile, would indicate over cautious timidity, and would seem to most men *puerile*.

On such subjects, as on all others, men exercise their reason, and do not yield to childish apprehensions of distant engines or unloaded guns. When they draw near a railway crossing, and the flagman gives no warning, when no sound or sign indicates the presence or approach of a train, they assume that they may safely cross and proceed quietly on their way. If, in such a case, an engine with muffled bell, rushes upon them too suddenly for escape, the wrong is due to those who falsely assured their safety by withholding the usual warning.

The citizen who on a public highway, as he approaches a railway track, and can neither see nor hear any indication of a moving train, is not chargeable in law with negligence for assuming that there is no car sufficiently near to make the crossing dangerous. (*Newson* agt. *The N. Y. Central*

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R. R. Co. 29 N. Y. R. 390 ; Johnson agt. The Hudson River R. R. Co. 20 N. Y. R. 74 ; Hegan agt. The Eighth Avenue R. R. Co. 15 N. Y. R. 383 ; Harper agt. Curtis, 1 E. D. Smith, 78 ; Gordon agt. Grand St. R. R. Co. 40 Barb. 550 ; Pennsylvania R. R. Co. agt. Ogier, 35 Penn. 60, 72.) In the case first cited, Judge JOHNSON, who delivered the opinion of the court, stated the rule thus : "The law will never hold it imprudent in any one to act upon the presumption that another in his conduct will act in accordance with the rights and duties of both." In case of *Gordon agt. Grand St. R. R. Co.*, Judge BROWN traced the rule to the reason on which it is founded. "Negligence," he said, "cannot be predicated of such an act. Care in avoiding danger implies that there is, or would be, with all prudent persons, something to create a sense of danger ; for if the circumstances are not such as would put a prudent and cautious person upon his guard, the omission to exercise more than ordinary attention, is not the negligence which contributes to an accident." In the case last cited, the court in considering the effect of the omission to give the customary signals, on the question of due care by the plaintiff, used language equally explicit. "A defendant cannot impute a want of vigilance to one injured by his act as negligence, if that very want of vigilance were the consequence of an omission of duty on the part of the defendant."

In the present case, the defendants not only misled the testator by not exhibiting the flag at the crossing, in accordance with the uniform custom when an engine was near, but also by approaching the highway illegally, neither sounding the whistle or ringing the bell as they advanced. This was an act in open defiance of the public statute enacted for the protection of the traveler. It was a flagrant breach of duty to the passengers whose safety it jeopardized, to that of stockholders, whose property it imperiled, and to the testator life whose it exposed. Its direct tendency was to put him off his guard, to disarm his vigilance, and to produce a false sense of security.

To transfer the blame to him, would be to screen the

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wrong-doer at the expense of the victim. It is not the policy of the law to favor those who deliberately violate its mandates, nor is it the duty of the courts to invent excuses for wrong-doers, or to palliate the guilt of reckless homicide. Our statutes for the protection of life are to be obeyed, and when they are broken and defied, responsibility is not to be evaded by imputing blame without proof to him who suffers death, for the sake of shielding those who inflict it.

In this case the parties inculpated have been sworn. Ernst of course could not confront them ; but we are to judge him in the light of the evidence, by the ordinary rules which govern human action. He was a man of business, in the vigor of middle life, and in the full possession of his faculties. He was a man of family and character, of experience and of judgment. He had no apparent motive or inducement to make a wanton sacrifice of his life. He had the ordinary instincts of humanity. If, on this occasion he did anything which he ought not to have done, or left undone anything which he ought to have done, it was in the brief interval of nineteen seconds. It is said he should have looked north before he drove down the street, which the defendant by violating the statute, could convert into a *cul de sac* to the traveler. That was precisely what he did. In turning his horses around to drive from Broadway into Rensselaer street, he necessarily faced to the north and west, thus commanding a view of the track directly in front, for a distance of some twenty rods. He did not see the cars for the simple reason that they were not there. They were still behind the hill, and nearly sixty rods north-east of the crossing.

It is claimed that he started at a high rate of speed, but the proof is that he started on a walk ; that he went down Rensselaer street on a slow trot, and that he did not quicken his gate until as he approached the track, he was beckoned to hasten on to the ferry boat which was waiting for him at the landing. It is also said that he should have been on the lookout for the flag uniformly displayed at the crossing when a train was near. He did look, and he saw that there

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was no flag, which was a direct assurance by the defendant that there was no engine advancing on either side within a quarter of a mile. He was forewarned of no approaching danger, and it was not to be expected, under such circumstances, that he should be forearmed with extraordinary vigilance. The plaintiff is reproached for the fact that the husband had a shawl around his neck. It is the ordinary precautions on a cold winter morning, of every traveler who has one to wear, and it was no more a breach of duty to this railroad company, than it would have been if he had worn a fur cap or a second overcoat.

It is claimed that he should have listened for the whistle and the bell. He did, and the fact that neither was sounded, was a further assurance by the defendant that there was no engine in motion within eighty rods of the crossing.

It is also claimed that he should have stood up in his sleigh. He owed no such duty to the defendant. It would be scarcely more absurd to hold that a footman should climb a tree or mount a fence before crossing, to assure himself that the company was not breaking the law by sending an engine without signals to run over travelers on a public highway.

It is insisted that he ought to have looked before him and on both sides, as he advanced. He did; for he is proved to be a man of clear vision, and he could not avoid so looking, except by closing his eyes. He was sitting on the bottom of his sleigh, and, of course, his range of vision was essentially limited; but to say that he did not or could not see whatever was within that range, would be in direct hostility to the proof. It would be as idle as it would be to assume that one who is driving down the centre of State street, cannot see that there are buildings on both sides of the way, or that a Hudson river pilot cannot see both shores of the river in front of him without turning his head back and forth in the wheel house.

It is said that he should have observed the man who was beckoning to him from the ferry side of the track. He doubtless did, unless the horses in front of him partially

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obstructed his view ; and it is reasonable to assume that he understood it as others did, as urging him to hurry on to the boat.

It is claimed that he was bound by an inflexible rule of law, to see, to hear and to understand the two persons who hallooed, one from the station house and the other from the store, as he was passing between them. There is no such rule of artificial presumption, and we see no reason for its adoption, if we were at liberty to change the law of evidence. It would be an arbitrary legal intendment on a pure question of fact, without reason or truth to commend it. We have no authority to invent rules for the purpose of shielding wrong doers. It was a question of fact for the jury, whether the testator saw and heard these men. His advanced position and his winter attire, did not favor a lateral view. It is obvious that he did not hear what they said, for it was heard by no one else ; and they were speaking simultaneously, from opposite sides of the street. Neither of them called him by name, and if his attention was directed, as it naturally would be, to the movement of his horses and the steep descent to the ferry boat directly in front of them, he probably assumed that the men were speaking to each other across the street, an incident of ordinary occurrence in a country village. It is quite probable too, that he heard simultaneously the rush of the train, as all this occurred within a few seconds of the fatal collision. His horses were under full headway, and every one who is accustomed to drive knows the difficulty of controlling even a single horse when brought suddenly in presence of an engine rushing upon him at the rate of forty miles an hour. It is proved and understood, that his horses were frightened ; that they sheered southwardly on the track, and that he struggled ineffectually to rein them back. The evidence establishes an adequate cause of death in the defendant's wrong. It affords no warrant of imputing to the testator the guilt of complicity in that wrong.

The dernier claim of the respondent, all other defenses failing, is that the testator was guilty of culpable negligence

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in not listening for and hearing the rumble on the rails, of a train which he had no reason to expect, and which gave no signal of its approach. That he did not hear it in time to escape the collision is so obvious, that the defendants do not claim that he did ; but they insist that he *ought* to have heard it, and that his failure to do so was a breach of duty to the company.

This theory is founded upon the incidental opinions expressed by two of the witnesses, not as to the distance this train might have been heard under the actual circumstances, and with the intervening obstructions, but on the general question, how far it might be possible to hear a train approaching when omitting the customary signals, in violation of law. Neither of them professed to speak from actual knowledge or observation, and their estimates were widely different. One thought it might be detected at a distance of one or two miles, and the other, that it would not be audible when the whistle would be at the distance of seven or eight rods. It is obvious that speculative opinions on such a question scarcely rise to the grade of evidence. The distance at which the approach of a train can be heard without the signals, must depend on a great variety of circumstances, such as the structure and condition of the particular rails, the firmness of the ties, the direct or winding course of the track, the condition of the atmosphere, the direction and course of the wind, the shutting off of steam, the proximity of distance to the line of the rails, the prevalence of other sounds, the acuteness of the observer's hearing, the depression or elevation of the track, the vicinity of valleys, woods and hills, the hour of the day or night, the comparative silence of the country, or the hum and bustle of city life, and the vicinity of steamboats, factories and public works. Mere speculation on the general question, without reference to these and other like conditions, is plainly idle and illusory. It is proved, as matter of fact, that though such a number of witnesses were present on this occasion, each under more favorable circumstances for hearing it than the testator, the practiced ear of the ferryman, who listened daily for the

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approach of the trains, did not catch the sound until the engine was within three hundred feet. Taylor, Traver, Ten Eyck, Hunter and Vandenburg, did not hear it at all until just as it rushed down over the crossing; the horses of Ernst did not hear it until they were close upon the track; and at the ice house, Brown did not hear it until his wagon was upon the rails, and the engine within less than a hundred feet of him.

It was because the approach of a railway train is stealthy and imperceptible, and because the sound is not readily distinguishable from others associated with no danger, that to secure the traveler at once against needless apprehension and needless exposure, a statutory mandate was given to every such company in this state to approach no public highway crossing with an engine, without public and distinctive signals of danger for a distance of eighty rods before passing such crossing.

The duty is plain and absolute. The company which violates it does so at its peril. If its agents are faithless, it should dismiss them. If its officers choose to disobey a law for the protection of human life, or to tolerate its violation by their subordinate agents, the remedy is in the hands of the stockholders, by selecting those who will respect our public statutes. When the illegal act results in the death of a citizen, the company must respond, unless he has been guilty of a breach of duty, which contributed to his destruction. He is not guilty of such breach of duty when he assumes, in the absence of any indication to the contrary, that the company obeys the law, and that no engine is advancing to the crossing within a distance of eighty rods, without public signals of its approach. If he is deceived by the unlawful omission of the signals, the wrong is not his but theirs. The illegal act of the company does not, however, justify him in encountering the risk of crossing, if he sees or hears the approach of the engine, or is otherwise notified of its presence in season to avoid the peril. In that case he is guilty of culpable negligence, and the company is relieved from the responsibility of causing his death. But it is no

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defense of the wrong-doer, that though the victim did not see or hear the engine, and was not notified of its approach in time to avoid the collision, he *might* have seen or heard it if he had exercised a higher degree of vigilance, and had foreseen a violation of the law, instead of relying upon its observance. Such a theory has received countenance in a few instances, in the opinion of individual judges. It has support in the *dictum* of the accomplished and able jurist who delivered the prevailing opinion in this cause on a former occasion. This question, however, was not then passed upon by the court, nor was it involved in the decision. On the proof as then presented, the question was whether one was culpably negligent who rode nearly a hundred and fifty feet in full view of the approaching train; who knew it to be due, and who persisted in driving against it though notified by four persons of its presence in season to avoid the danger.

Certainly the views of this court on the theory suggested, have been announced too often in adjudged cases, involving the precise question, to be open to any misconception, and to some of these cases we shall have occasion to refer. We think the railroad companies themselves have given a correct exposition of their own obligations and the rights of the public, in the ordinary warning inscribed over highway crossings: "Look out for the cars when the bell rings." In our view, the rule of law is essentially misapprehended by those who would make the inscription read: "Look out for the cars when the bell does *not* ring." The usual argument in favor of such a theory is, that trains are constantly passing and repassing, at every railway crossing. Certainly we are not admonished of this by the constant ringing of the bell, and every man of ordinary observation knows the fact to be otherwise. If ten regular trains a day are run over a given highway, they render the crossing unsafe when they pass, and only then. It is free from danger, except, at most, for twenty minutes in the aggregate of each twenty-four hours, and the traveler is safe against exposure at those momentary intervals, if the company obeys the

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law and rings the bell. If it will not do that, it has no cause of complaint against the wayfarer whom it voluntarily misleads. In such case the language of Chief Justice BEARDSLEY is appropriate: "A man is under no obligation to be cautious and circumspect towards a wrong-doer" (*Tonawanda R. R. Co. agt. Munger*, 5 Denio, 266).

It is not true that a traveler on a public thoroughfare, is guilty of culpable negligence, as matter of law, if he does not stop to listen, or look up and down the track before he goes over a crossing. The proposition is in direct conflict with repeated adjudications in this and in other courts. Whether such an omission is culpable, depends upon the facts and circumstances of each particular case.

There is a class of cases in which the proof of the plaintiff's negligence is clear and undisputed, and whenever this appears, a non-suit is matter of legal right. A party who sees or hears an approaching engine, and chooses to take the risk of crossing before it, rather than await its passage, forfeits all claim to redress; and under such circumstances, it is not only the right but the duty of the court to apply the familiar rule—*votenti non fit injuria*. But there is another class of cases in which it is equally well settled that we have no authority to impute negligence to the deceased, for an omission which may fairly be attributable to the very wrong resulting in his death.

In the case of *Brown agt. The N. Y. Central R. R. Co.*, decided at the last June term, we held that no culpable negligence was established, though it was proved by the driver of the coach demolished by the collision, *that he did not look in the direction from which the cars were approaching until his horses were upon the track*. The usual signal of danger not being given as they advanced to the crossing, and this, though it appeared in the evidence that if he had looked before, he would have seen them in season to avoid the collision (32 N. Y. R. 597).

The doctrine of that case was unanimously reaffirmed upon a like state of facts, at the last December term of this court (*Stilwell agt. The N. Y. Central R. R. Co.*).

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In the earlier case of *Megrath* agt. *The Hudson River R. R. Co.*, the same rule was clearly announced. "It is not always negligence," said the court, "to cross a railroad track at times when a train is not due, or cannot reasonably be expected to pass; *nor to cross a railroad track without looking for a train*, when no signal of its approach is given by the ringing of a bell or otherwise (32 Barb. 147). So, also, in the case of *Warren* agt. *The Fitchburgh R. R. Co.*, it was held by the supreme court of Massachusetts, a state in which no undue rigor of intendment is supposed to prevail against corporations, that crossing a railroad track *without looking to see if a train is coming*, is not conclusive proof of want of care" (8 Allen, 227).

In the case of *Fero* agt. *Buffalo and State Line R. R. Co.*, it was claimed that the plaintiff could not recover for the injury, as it was apparent that he could readily have averted it by the exercise of greater care; but this court held, that "if he was guilty of no culpable negligence, the mere fact *that he might have been more vigilant*, will not excuse the wrongful act of the defendants, nor deprive the plaintiff of redress for the injury he has suffered" (22 N. Y. R. 213).

The question whether the plaintiff was free from negligence, in ordinary cases of this description, is one of fact, to be determined by the jury under appropriate instructions, and subject to the revisory power of the courts. Occasional instances occur, where the proof of misconduct is so clear and decisive, that the judges are bound to pass on the question of negligence as matter of law. It is a mistake, however, to suppose that the decisions made from time to time, in these two classes of cases, conflict with each other, or involve any departure from the settled rules of law, where the question arises on a state of facts on which fair minded men may rationally arrive at opposite conclusions, the issue is properly submitted to the jury. Where, as sometimes happens, in exceptionable cases, the injury is traceable to clear and unquestionable misconduct on the part of the plaintiff, it is the plain duty of the court to apply the law to the facts without the intervention of the jury. In the present case,

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there is a renewal of the attempt so often made, to extend the exceptional rule to all classes of cases. It is our province to uphold the law, and not to alter it. We believe it to be wise and just, but if we deemed it otherwise, we have no authority to subvert it. We should be restrained from making the innovation proposed, not only by our own repeated adjudications, but by that time-honored and elementary maxim on which our system of jurisprudence is founded: *Ad questionem facti non respondent iudices—ad questionem legis non respondent juratores.*

The views of this court as to the right of the party claiming redress, to have the question, whether he was free from negligence, determined ordinarily by the jury, have been repeatedly expressed with great clearness and emphasis.

In the case of *Ireland* agt. *The Oswego R. R. Co.*, Judge JOHNSON said: "The fact of negligence is very seldom established by such direct and positive evidence that it can be taken from the consideration of the jury and pronounced upon as a matter of law. On the contrary, it is almost always to be deduced as an inference of fact, from several facts and circumstances disclosed by the testimony, after their connection and relation to the matter in issue have been traced, and their force and weight considered. In such cases, the inference cannot be made without the intervention of a jury, although all the witnesses agree in their statement, or there be but one statement, which is consistent throughout. Presumptions of facts, from their very nature, are not strictly objects of legal science, like presumptions of law. That the care exercised by the plaintiff at the time of the injury, and the negligence of the defendant, were both questions for the jury to determine, cannot admit of any doubt" (3 *Kern.* 533).

In the case of *Keller* agt. *The N. Y. Central R. R. Co.*, Judge MASON delivered the opinion of the court, and after citing the foregoing exposition of the rule, he proceeded to say: "What constitutes negligence in such cases, is determined by an inference of the mind from the facts and circumstances of the case, and as minds are differently consti-

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tuted, the inference from the given state of facts and circumstances will not always be the same. I admit that the facts may be so clear and decided, that this inference of negligence is irresistible, and in every such case it is the duty of the court to decide; but when the facts, or the inferences to be drawn from them, are in any degree doubtful, the only proper rule is to submit the whole matter to the jury, under proper instructions" (24 *How.* 177).

Similar views were expressed by Judge DENIO, in the case of *Hagan* agt. *The Eighth Avenue R. R. Co.*, and by Judge SELDEN, in that of *Bernhardt* agt. *The Rensselaer and Saratoga R. R. Co.* It was said by the latter, with the precision and perspicuity which mark all his judicial opinions, that "although as a general rule, questions of negligence belong exclusively to the jury, cases may no doubt arise in which the proof of negligence would be so clear and irresistible, that the court would be justified in assuming, without submitting the question to the jury, that negligence was established. At the same time it is obvious, considering the nature of the question, that such instances must be rare. If there is any conflict in the evidence going to establish any of the circumstances upon which the question depends, it must be left to the jury. If there are inferences to be drawn from the proof which are *not certain and incontrovertible*, they are for the jury. If it is necessary to determine, as in most cases it is, what a man of ordinary care and prudence would be *likely* to do under the circumstances proved; this involving, as it generally must, more or less of conjecture, can only be settled by a jury" (23 *How.* 168).

The struggle of defendants to inaugurate a different rule, and to induce the courts to resort to artificial refinements for the protection of wrong-doers, is perhaps excusable in those who are impatient of legislative restraint.

There is an unfortunate and growing tendency to regard human life as of secondary importance in comparison with the objects of commercial and corporate enterprise. The aid of the courts is invoked to annul by indirection the force of general law. Suits and appeals multiply in the con-

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stantly increasing ratio of reckless injuries, which nothing could tend more to encourage than this theory of immunity from civil damages, on the assumption, as matter of law, that a party over whom an engine is driven, is culpable for not keeping out of the way, and that the question whether he was really guilty of negligence, is not one of fact for a jury.

If it were true, as sometimes intimated even from the bench, that false verdicts are occasionally rendered on questions like this, the remedy is to set them aside and not to usurp the prerogative of the jury. Even among the cases which have been held so plain as to justify a non-suit, there have been few in which the judges have not themselves disagreed, and the inquiry naturally occurs to the mind, whether we are less liable than jurors to err on questions of pure fact pertaining to the ordinary affairs of life. Our law is framed upon the theory that on such questions the citizen can rely with more security on the concurrent judgment of twelve jurors, than on the majority vote of a divided bench. Unanimity is not required in our decision on questions of law. It is otherwise with jurors charged with the duty of determining issues of fact, and such issues should not be withheld from the usual arbiters, unless the evidence leads so clearly to one result that there is no room for honest difference between intelligent and upright men. A non-suit should always be granted where the proof is so clear as to warrant the assumption, in good faith, that if the questions were submitted to the jury, they would find that the culpable negligence of the plaintiff contributed to the injury. But we have had occasion recently to hear non-suits of this kind justified on the novel ground that unless the fact be determined in one way by the judge, it will be sure to be determined in the other by the jury. The correctness of judicial opinions on mere questions of fact, may well be distrusted, when we find them confessedly opposed to the common sense of mankind.

The judgment should be reversed, and a new trial ordered.

All the judges concurring, judgment reversed, and new trial ordered.

Niblo agt. Binsse.

SUPREME COURT.

WILLIAM NIBLO agt. JOHN BINSSE, Executor, and LOUISA
LA FARGE, Executrix of JOHN LA FARGE, deceased.

The following is the dissenting opinion of Judge SUTHERLAND, in this cause—the opinion of the court is published in 31 *How.*, 476.

SUTHERLAND, J. It was certainly irregular to enter judgment for costs against the executors, without an application to the court, and special leave granted.

The referee was not the court, and had no power to award costs against the executors. The plaintiff could not by any allegation or allegations in his complaint, make the question of costs a proper question for the referee to try or determine.

The plaintiff's motion for an extra allowance, and the order made for an extra allowance, assumed that the referee had power to award costs, and had awarded them; for clearly an order for an *extra* allowance of costs, could not be made before the plaintiff's right to recover their general or ordinary taxable costs had been determined.

The statute does not permit the recovery of costs against executors, unless it appear that the demand was unreasonably resisted or neglected, or that they refused to refer the same. (2 *R. S.* 90, § 41; *Code*, § 317.)

In this case, it is impossible to say that the executors refused to refer the same, unless a refusal to pay is, or should be, regarded as a refusal to refer. The very words of the statute would appear to forbid such a construction of it. The refusal to refer is one thing, and the unreasonable resistance or neglect of payment is another thing. They do not mean the same thing, in or out of the statute.

The question is, then, did the executors *unreasonably* resist or neglect the payment of the demand or claim? In view of the history of the case, and of the litigated questions in it, how can we say that they did? On the first trial they obtained a judgment, which was affirmed at general term, but reversed in the court of appeals. We must conclude

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that the question of their liability was a question of liability under special circumstances, and by no means free from doubt. It certainly cannot be said that the motion papers on the part of the plaintiff show that the demand was unreasonably resisted or neglected by the executors, and it was for the plaintiff to show this. It appears that the executors would have successfully resisted the demand, had it not been for the lucky hit or persevering energy of the plaintiff in carrying the case to the court of appeals.

I cannot see that the fact that the attorney of the executors did not insist before the referee, on the trial, or clerk, on the adjustment, of costs, or before the court, on the motion for extra allowance, that the plaintiff could not recover costs without a special application to the court, can or ought to *estop* the executors from insisting upon their protection from costs under the statute. I can see no way to affirm the orders appealed from, without disregarding the statute.

I think both orders should be reversed, and the costs stricken from the judgment.

NEW YORK SUPERIOR COURT

DAVID JACKSON agt. JAMES LYNCH, Sheriff, &c.

A sheriff on succeeding in his defense to an action, is entitled to double disbursements, as well as double costs.

Special Term, February, 1866.

IN this case, the clerk in adjusting costs of defendant, gave him double costs, but declined to double the defendant's disbursements.

The only question on this appeal is, is the defendant entitled to double disbursements?

IRA D. WARREN, *for plaintiff.*

I. The Code draws a clear distinction between *costs* and *disbursements*. Section 305 provides that "costs shall be allowed of course to the defendant," &c. Section 307 pro-

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vides, "when allowed, *costs* shall be as follows," giving the amounts and items allowed as costs. Section 311 provides, "that the clerk shall insert in the judgment the sum of allowances for *costs*, the necessary disbursements," &c. The disbursements shall be stated in detail, and verified by affidavit. Therefore, we say, costs and disbursements are entirely distinct.

The Code does not take away the right of the sheriff to double *costs*, but we claim it does take away his right to double *disbursements*, if he ever had any such right before.

The Code regulates the *amount* of the sheriff's *costs*, but leaves that amount to be doubled when they are fixed.

II. Unless there is some statute clearly authorizing it, the sheriff should not be allowed double disbursements.

There is no reason why the sheriff should collect fifteen dollars for every ten dollars he pays out; nor why, when he pays the clerk one dollar for entering a judgment, he should collect of the other party one dollar and fifty cents for the same thing.

It is offering the sheriff a large premium to make large disbursements.

III. The adjusting of the costs should be sustained.

A. J. VANDERPOEL, *for defendant*.

MONELL, J. The item of ten dollars term fee for December term, was properly allowed. The fee is given for each term not exceeding five, at which the cause is necessarily on the calendar and is not tried, or is *postponed by order of the court*. Any postponement of a trial can only be by the order of the court, either upon its own motion, or on motion of one party, or by the consent of both. On the consent of the parties in writing, or in open court, an *order* must be made postponing the trial. This is usually done informally. Nevertheless it is sufficiently clear, and by order of the court. To avoid the costs against the party ultimately losing, a provision to that effect should be inserted in the order for postponement. If it is not, the term fee will be properly taxable.

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I find two cases in this court, decided at special term, where double disbursements have been allowed to a sheriff succeeding on the trial, and although the question of the right to double costs was not directly passed upon, yet the question was involved in each of these cases, and I am inclined to follow them in this case, without committing myself herein to any opinion, should the question ever come before me at the general term.

There must be a re-taxation, with instructions to the clerk to allow double disbursements.

NEW YORK COMMON PLEAS.

GEORGE H. CHAPMAN and others agt. THE UNION BANK.

Where a note payable at the "Bank of Kent, Kent, N. Y.," was deposited with the Union Bank, N. Y., for collection, without any other direction as to the post office address of the Bank of Kent, the Union Bank was authorized to send the note to the address designated in the note, and was exonerated from liability, on its failure to reach the Bank of Kent.

General Term, May, 1864.

Before DALY, F. J., BRADY and CARDOZO, Judges.

By the court, CARDOZO, J. It is very clear that if the plaintiffs on depositing the note in question, with the Union Bank for collection, had directed them to transmit it to the Bank of Kent, addressed to the "Bank of Kent, Kent, N. Y.," and that direction had been followed, the defendant would not have been liable if the note failed to reach its destination. The order of the plaintiffs would have been obeyed, and if they erred, they must bear the consequences of the blunder. In this case they did what was equivalent to that. They deposited with the defendant for collection, a note, which on its face contained a notice that it was payable at the "Bank of Kent, Kent, N. Y." It is not pretended that the plaintiffs advised the defendant that Kent was not the post office address of the Bank of Kent, nor that any instruction, except what might be fairly inferred from the address con-

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tained in the body of the note, was given by the plaintiffs to the defendant. I think, therefore, that the defendant was clearly authorized to adopt the address designated in the body of the note. Had any other been employed, and the note had miscarried, the plaintiffs might justly have charged that the defendant was guilty of negligence in not adopting the address furnished by the instrument itself. It is a mistake to suppose that the evidence shows that the New York State Bank (the correspondent of the defendant) knew that letters sent to Kent would not reach the Bank of Kent. It is true, that the habit of the New York State Bank, although it had had but little dealing—not oftener than once or twice a year—with the Bank of Kent, had been to direct its communications to George Ludington, cashier, Ludingtonville, New York, but there is nothing to show that it knew or believed that a communication addressed to the bank of Kent, at Kent, would not go quite as safely as if addressed the other way. I think the justice must have found that the envelope containing the note in question, was addressed to “Bank of Kent, Kent, N. Y.” Mr. King, the corresponding clerk of the New York State Bank, swears that he received the note and entered it in the books of the New York State Bank; that it was indorsed over to the cashier of the Bank of Kent, and with a letter to said cashier, was put in an envelope addressed, “Bank of Kent, Kent, N. Y.,” and mailed. If this be so, the defendant and its correspondent performed their whole duty. I am aware that the cashier says that the envelope was addressed “Bank of Kent, George Ludington, cashier, Kent, N. Y.,” but without examining whether the insertion of the words “George Ludington, cashier,” would affect the question, it seems to me that in favor of sustaining the judgment, we should presume that the justice regarded Mr. King’s version of the address as correct. This is the only question in the case worthy of remark.

The judgment should be affirmed, with costs.

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SUPREME COURT.

CYPRIAN S. BRAINERD, JR. agt. JESSE A. HEYDRICK, and others.

The *subscription* of the name of an attorney issuing a *summons*, is not required to be made by *himself personally*; but it may be made by another with his authority. It necessarily follows, that his name may be *printed*, as a substitute for his written signature. (*This agrees with the case of The Mutual Life Ins. Co. agt. Ross*, 10 Abb. 260, and is adverse to the case of *The Farmers' Loan and Trust Co. agt. Dickson*, 17 How. 477.)

It is well settled, that where a person is in the habit of using documents with his name *printed* thereon, this will be his *signature* within the meaning of the statute of frauds.

The name of an attorney issuing a *summons*, is as effectually disclosed when it is *printed* as if it were written, and his responsibility to the defendant and to the court, in either case, is the same.

In granting an order of publication for the service of summons in an action for the *foreclosure of a mortgage*, the Code requires that it shall appear "by affidavit to the satisfaction of the court or a judge" granting the order that the person on whom the service of the summons is to be made, cannot, after due diligence be found in this state. There is no good reason why this may not be shown by an *affidavit* properly made and forming a part of the records of the court, although made in *another action*, and not in the particular action in which the order is asked.

In an action for the foreclosure of a mortgage, the *non-residence* of the defendants is not necessary to be shown. It is sufficient to establish the fact satisfactorily that they could not, after due diligence, be found within this state, so as to enable the plaintiff to effect the service of the summons on them.

A copy order appointing a *guardian ad litem* of a non-resident infant defendant, is not invalid by reason of being deposited in the *post office* two days before the order and the affidavits on which it was founded *were filed*, where it appears that the order was made on the day of the deposit. The order becomes effectual when filed, from the time it is granted. The previous deposit is, at most, an irregularity that can be remedied at any time by filing the order *nunc pro tunc*.

Kings County Special Term September 1866.

THIS is an application on behalf of a purchaser of mortgaged premises sold under a judgment of foreclosure and sale, to be discharged from his purchase on the following grounds :

1st. That the summons is not subscribed by the plaintiff or his attorney.

2d. That the affidavit on which the order of publication was granted is insufficient; and

3d. That no copy of the order appointing a guardian *ad*

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litem of the non-resident infant defendant, was served according to the terms of the order.

WM. HENRY ARNOUX, *for the purchaser.*

BRAINARD, RICE & BURNETT, *for the plaintiff.*

LOTT, J. These grounds will be examined in the order they are above stated :

1st. The first objection is based on the fact appearing by the judgment roll, that the names of the plaintiff's attorneys are printed at the end of the summons forming part of the roll. This, it is claimed, is not a compliance with the requirements of the Code, which provides that "the summons shall be subscribed by the plaintiff or his attorney," and shall require the defendant to "serve a copy of his answer on the person whose name is subscribed to the summons," &c.

It then becomes necessary to determine whether a summons issued by an attorney, with his name printed at the end thereof, is subscribed by him within the meaning of that provision.

Two cases were referred to on the argument of the motion in which the question has been considered, and I have been unable, after a careful examination, to find any other, and in those the learned justices who examined it arrived at different conclusions.

The first was the case of *The Farmers' Loan and Trust Company* agt. *Dickson*, reported in 17 *How. Pr. Rep.*, p. 477; and also in 9 *Abb. Pr. Rep.*, p. 61, which was decided by Justice INGRAHAM, at special term in the first district. A motion was there made by a purchaser to be relieved from a sale, on the ground, among others, that the name of the attorney was printed at the end of the summons, and the learned justice after considering two other objections that were made to the proceedings, and stating that one of them could be remedied by filing an affidavit of the summons on one of the defendants "*nunc pro tunc*," says in relation to that now under consideration : "The summons should have been signed by the plaintiff or his attorney (§ 128), and the

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printed name of the attorney was a nullity. As the copy served was correct, the plaintiff might also file a copy properly signed *nunc pro tunc*."

The other case was that of *The Mutual Life Insurance Company* agt. *Ross*, reported in a note at page 260 of 10 *Abb. Pr. Rep.*, in which the defendant moved to set aside the summons served upon him, on the ground that the name of the plaintiff's attorney was printed at the end thereof. On the argument of that motion, the decision of Judge INGRAHAM was referred to and commented upon by counsel, and the report of the case closes with saying that "E. D. SMITH, J., after consideration, denied the motion with costs, upon the ground that a printed subscription is a substantial compliance with the statute, and the objection was technical, and if there was a defect it was immaterial."

Neither of these learned justices appears to have assigned the reasons for the conclusion at which he arrived. I am, therefore, obliged to examine the question embarrassed by their difference of opinion, without the benefit of the aid which those reasons would have afforded. In doing this it may be useful to ascertain the scope and extent of the decision of Justice INGRAHAM. He treats the words "subscribe" and "sign," as synonymous; and when he says that the summons should have been signed by the plaintiff or his attorney, and that the printed name of the attorney was a nullity, he clearly indicates that such signature should have been in the proper handwriting of such attorney. If this was his meaning, he was, in my opinion, mistaken. Previous to the adoption of the Code, it was provided by the Revised Statutes (2 *Rev. Stat.* p. 278, § 9), that all writs and process issued out of any court of record, should before the delivery of the same to any officer to be executed, "be subscribed or indorsed with the name of the attorney, solicitor or other person," by whom the same was issued; and yet in the same title, at page 286, section 70, it is declared that "if any attorney or solicitor shall knowingly permit any person, not being his general law partner, or a clerk in his office, to sue out any process, or to prosecute or defend any

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action in his name, such attorney and solicitor, and every person who shall so use the name of any attorney or solicitor, shall severally forfeit to the person against whom such process shall have been sued out, or such action prosecuted or defended, the sum of fifty dollars."

This last provision is still in force, and by exempting the general law partner and the clerks of an attorney, from the penalty imposed for using his name in issuing process, and prosecuting and defending actions, it is clearly implied that it may be so used by them by his permission and authority.

Although the Revised Statutes provide that the process "shall be subscribed or indorsed *with the name* of the attorney, solicitor or other person," issuing the same, and the requirement of the Code is, that "the summons shall be subscribed by the plaintiff or his attorney;" the difference in the phraseology does not, in my opinion, justify the conclusion that a difference in practice was intended.

It will be observed that the use by a clerk of the attorney's name, appears to be authorized under the provision above referred to, in actions in which the attorney himself has no interest or connection, and it has, I believe, been the general practice of attorneys to allow a clerk in their office to sign their name to process issued by them. The authority given to the clerk by the attorney in such a case, makes it his act, and he is responsible therefor to the court and the party proceeded against, and I have found no case where the practice has been called in question. There certainly appears no reason in principle why it should not be permitted. There are many instruments which the law requires to be subscribed or signed by the parties to be bound thereby, and yet a subscription or signature by him personally is not necessary. Thus the statute regulating the execution of wills, after expressly providing that every will "shall be subscribed by the testator," recognizes a signing of his name by another person, as a compliance with that provision, by a subsequent requirement that "every person who shall sign the testator's name to any will, by his direction, shall write his own name as a witness to the will;" and it was

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distinctly decided in *Robins and others agt. Coryell* (27 Barb. Sup. Co. Rep., p. 556), after a full and careful examination of the question, that the writing of the testators's name to a will, by another person, in his presence and by his direction, is a subscription by him within the meaning of that statute ; and an opinion to the same effect is expressed by Chancellor WALWORTH in *Chaffee agt. Baptist Missionary Convention, &c.* (10 Paige, p. 91, &c.), and by HAND, J., in *Butler agt. Benson* (1 Barb. Sup. Co. Rep. p. 533, &c). So the statute of frauds, requiring certain agreements to be in writing, and to be signed or subscribed by the party to be charged therewith, is satisfied by the signature or subscription of the name of such party thereto by another person duly authorized to make it.

If such is the rule applicable to statutes, in the case of wills and other written instruments requiring the subscription of parties, I am unable to discover any reason why a different construction should be given to that in relation to legal process. The views thus presented lead us to the conclusion that a subscription of the name of an attorney issuing a summons, is not required to be made by himself personally, but that it may be made by another with his authority ; and assuming this to be correct, it seems to follow that his name may be printed, as a substitute for his written signature. A party may in the ordinary transactions of business, become bound by any mark or designation he thinks proper to adopt and use for his name. It was decided in *Brown agt. The Butchers' and Drovers' Bank* (6 Hill's Rep. p. 443), that Brown was liable as indorser, by an indorsement of the figures "1, 2, 8," made by him in lead pencil, no name being written thereon, it also appearing that he could write. In that case, the court instructed the jury that if they believed the figures were made by Brown as a substitute for his proper name, intending thereby to bind himself as an indorser, he was liable, and this ruling was sustained on review. So it has been held by the general term in this district, in the case of *The Mechanics' Bank agt. Sullivan*, heard in December, 1862 (but not reported I believe),

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that a notice of the protest of a note sent to an indorser by a notary, with his name printed at the end of it, was sufficient.

It is a common practice for a person who is unable to write his name to make his mark, and the making of such mark is held to be a good signing or subscription, within the requirements of the law, by a testator to a will. (*Baker agt. Demins*, 8 *Adolph. & Ellis*, p. 94; *Jackson agt. Van Dusen*, 5 *Johns. Rep.* p. 144; *Chffae agt. The Baptist Missionary Convention*, 10 *Paige*, p. 85, &c.)

In the case of *Baker agt. Deming*, above cited, the court refused to permit an inquiry whether the person making his mark could write or not; adopting the rule that the requisite of *signing* by the statute of frauds, was satisfied by the mark of the devisor, irrespective of his ability to write.

Under our statute, it is required that a subscribing witness "shall sign his name as a witness," and it was claimed in the case of *Morris agt. Kniffin* (37 *Barb. Sup. Co. Rep.* p. 336), among other things, "that a mark-man cannot be, and is not a subscribing witness, within the meaning of the statute;" but the supreme court, at general term in the third district (Justice HOGBOOM giving the opinion), held that where a witness makes his mark instead of writing his name, it is still a signing of his name or subscription, within the meaning of the statute, and he refers with approbation to the decision by Surrogate BRADFORD, in the case of *Meehan agt. Rourke* (2 *Bradf. Rep.* p. 385, &c.), where he discusses the question, and concludes that such a mode of attestation was a sufficient compliance with the statute. (See also *Jackson agt. Van Deusen*, *supra*.)

So it was held by the lord chancellor in England, in *Harrison agt. Harrison* (8 *Vesey's* p. 185), that a will was sufficiently executed where one witness only subscribed his name, and the two others attested it by setting their marks respectively," and in that case it was shown that there had been a great many cases where it had been held to be sufficient for a "marks-man" to be a witness. (See also *Addy agt. Grix*, 8 *Vesey's* p. 504, &c.)

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It appears also to be settled that where a person is in the habit of using documents with his name printed thereon, this will be his signature within the meaning of the statute of frauds. (2 *Parsons on Contracts*, p. 289, &c. ; see also *Saunders* agt. *Jackson*, 2 *Bos. & P.* p. 238 ; and *Schneider* agt. *Norris*, 2 *M. & S.* p. 286).

In the last case *LE BLANC*, J., said, "Suppose the defendant had stamped the bill of parcels with his own name, would not that have been sufficient? Such a stamping as it seems to me, if required to be done by the party himself, or by his authority, would afford the same protection as signing."

There are also many cases where printing is substituted for writing in instruments which under our statute are required to be in writing. It is the general practice for deeds or conveyances of real estate, and bills of sale of personal property to be printed, and it is very common to use printed agreements for the sale of both real and personal estate, and their validity is conceded, yet the statute declares that all conveyances of land, and all contracts for the sale of lands, or a note or memorandum thereof, shall be in writing, subscribed by the party by whom the conveyance or sale is made, and also makes it necessary for a note or memorandum of every contract for a sale of goods, when the price thereof is fifty dollars or more, to be in writing, except in cases of part payment of the purchase money, or delivery of part of the goods. (See 2 *Rev. Stat.* p. 134, § 6, p. 135, § 8, and p. 136, § 3.

Assuming then that such instruments when printed are "in writing," within the requirements of those provisions of the statute, is there any good reason why printing of an attorney's name may not be permitted, as and for his signature to a summons or other legal process? In this connection I will refer to the fact that the Code provides for the service of a summons by delivering a copy thereof on a defendant, without the necessity of showing him the original (§ 134), and also authorizes a copy to be inserted in the judgment roll (§ 281). This appears to me a material fact

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in determining the question now under consideration. It is by the service of the summons that the action is commenced, and jurisdiction over the party is acquired, and if the service of a printed copy (for there is nothing to prohibit such a copy) is sufficient for that purpose, and such a copy may properly form a part of the judgment roll, there is no valid reason for requiring the paper spoken of, and denominated as *the* summons (but which may never be filed, but be forever kept in the pigeon holes of an attorney's desk), to be subscribed with the *written* name of the attorney, and for holding a printed subscription to be a nullity.

The *name* of the attorney issuing the summons, is as effectually disclosed when it is printed as if it were written, and his responsibility to the defendant and to the court, in either case is the same.

It would be necessary in any proceeding against him, to show that he was in fact the attorney issuing the process, and although there might be more difficulty in making that proof when his name was printed than there would be if it were written by himself, or by another with his authority, that difficulty exists in all cases of agency, and is not sufficient, on the ground of public policy or of any inconvenience to suitors, to require a different or a more stringent rule in case of legal process, than in any other case affecting the private rights of individuals.

The different considerations above presented, lead me to the conclusion that the summons in this case was subscribed within the requirements of the Code, and that the first ground of objection to the proceedings is consequently not well taken.

2d. The second objection involves the sufficiency of the affidavit on which the order of publication was granted.

It appears by the judgment roll, that the order purports to have been founded on an affidavit entitled in this action, made by David B. Burnett, one of the plaintiff's attorneys, and another made by Jeremiah Johnson, Jr., in a different action against the defendants in this, commenced by E. Brutus Brainerd, as plaintiff. The affidavit of Mr. Burnett, after setting forth the nature of the action, and showing

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that all of the defendants proceeded against as absentees, are proper parties, states "that the said defendants are, as deponent is informed and believes, non-residents of this state, and are now absent therefrom, and cannot, with due diligence, be served with summons herein; that as deponent is informed, the defendants Jesse A. Heydrick, Elizabeth Heydrick and — Heydrick, reside at Franklin, in the state of Pennsylvania; and that the defendants Charles H. Heydrick, and Anne, his wife, reside at Utica, in the said state of Pennsylvania." This was verified on the 13th day of May, 1866. The affidavit of Mr. Johnson was made on the 7th day of the said month of May; he stated positively, as a fact, that the said defendants at that time were non-residents of this state, and resided at the place mentioned in the affidavit of Mr. Burnett. It is claimed on behalf of the purchaser, that Mr. Johnson's affidavit being entitled in a different suit, could not be used in this. In that, I think, he is mistaken. The Code requires that it shall appear "by affidavit to the satisfaction of the court or a judge" granting the order, that the person on whom the service of the summons is to be made, cannot, after due diligence, be found in this state, and I see no good reason why that may not be shown by an affidavit properly made, and forming a part of the records of the court, although not in the particular action in which the order is asked. That may, in many cases, afford more satisfactory evidence of the fact than any proof that could otherwise be obtained. It appears to be the practice in England to read affidavits in one suit that have been used in another, on certain applications (*see Langston agt. Wetherell*, 14 *Meeson & Welsby*, p. 104), and I am of opinion it is allowable on an application for orders of publication, and of a like nature. The objection to it appears to be a matter of form merely, and not of substance. I shall, therefore, hold that the affidavit of Mr. Johnson was properly before the court, and that it, with the facts stated positively by Mr. Burnett, authorized the order.

In so holding, I agree with the counsel of the purchaser, that the allegation made by Mr. Burnett, on information and

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belief merely, is not evidence; but the absence of the defendants from the state is, as I understand his affidavit, positively stated by him, and that is a fact which affords at least some proof that they could not be served therein with the summons. In this case, being an action for the foreclosure of a mortgage, the non-residence of the defendants was not necessary to be shown. It was sufficient to establish the fact satisfactorily that they could not, after due diligence, be found within this state, so as to enable the plaintiff to effect the service of the summons on them, and that the case came (as it clearly did) within the fourth subdivision of section 135, which is distinct from the third subdivision having reference to non-residents of this state.

It is to be presumed from the fact of making the order, that the affidavits recited therein afforded satisfactory evidence to the court of those requisites, and the omission so to state in the order does not affect its validity.

I am, therefore of opinion, that the second ground of objection to the proceedings is not well founded.

3d. The third objection is based on the fact that a copy of the order appointing a guardian *ad litem nisi* of the non-resident infant defendant, was deposited in the post office two days before the order and the affidavits on which it was founded, were filed.

It appears, however, that the order was made on the day of the deposit, and the omission to file it until a subsequent day, does not invalidate the proceeding. According to our present practice, an order, and the affidavits on which it was founded, must in many cases be taken to a distant county, and it is often impossible to file them in the proper office on the same day the order is made. That however is effectual when filed, from the time it is granted.

The previous deposit is at most an irregularity that can be remedied at any time by filing the order *nunc pro tunc*. This, however, is not necessary. No guardian was ever appointed on the application of the infant, or of any relation on his behalf, and the original order *nisi* became effect-

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ual. The original appointment of the guardian has moreover been confirmed by the court.

An answer was put in by him for the infant, and judgment has been entered. Under such a state of facts, the regularity of the appointment of the guardian cannot now be questioned. (*See Rogers agt. McLean*, 31 *How. Pr. Rep.* p. 279, &c.)

It follows that the last ground on which the purchaser asks relief, is not available for that purpose.

I am thus, after a full consideration, brought to the conclusion that the application of the purchaser must be denied.

NEW YORK COMMON PLEAS.

CHARLES COOPER AND JOSEPH P. DISBROW agt. JACKSON S. SCHULTZ and others, constituting the Metropolitan Board of Health.

The act creating the *Board of Health* in the city of New York, is *not unconstitutional*: 1st. Because as alleged, conferring the right on the board to *deprive a citizen of his liberty and of his property*, without due process of law:

2d. Because as alleged, conferring upon the board powers of *local legislation*, which under the constitution, can be conferred by the legislature only upon boards of supervisors, municipal corporations and incorporated villages;

3d. Because as alleged, it confers upon the board *judicial powers*, in contravention of the sixth article of the constitution, which provides for and limits the judicial department of the government.

Special Term, September, 1866.

THE plaintiffs brought this action to prevent the enforcement of the following ordinances made by the Metropolitan Board of Health:

§ 39. That no person shall become, or continue, or engage as or in the business of a butcher or cattle dealer, or as a vegetable dealer at or in any public or private market or stand in the cities of New York or Brooklyn, in said district, without a permit therefor from this board.

§ 45. That no cattle shall be driven in the generally built up portions of either of the cities of New York or Brook-

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lyn, except between the hours of nine of the evening and one hour after sunrise of the next morning; nor shall more than twenty cattle, or more than one hundred hogs, or more than one hundred sheep, be driven together; and they shall be driven in streets and avenues (leading towards their destination), where they will least endanger the lives of human beings.

§ 94. That no cattle, swine or sheep, geese, goats or horses, shall be yarded within or adjacent to the built up portions of either of the cities of New York or Brooklyn, without the permit of this board, or otherwise than according to the regulations.

The plaintiffs alleged that the enforcement would interfere seriously with their business, and that of all other butchers; that it would render it impossible to carry on the business in the way it had been heretofore carried on, and greatly increase the expense of carrying it on at all. It was alleged that the ordinances were void, both because the act establishing the board of health was unconstitutional; and because, even if it were constitutional, these ordinances were not made in the exercise of any powers granted to the board. It was also alleged that the board intended to order the removal of all slaughter houses from the city. Numerous affidavits were submitted on behalf of the plaintiffs, on which a preliminary injunction had been granted. The defendants, in moving to dissolve the injunction, submitted numerous affidavits showing accidents to have happened from driving cattle in the streets. They denied any intention to order the removal of all slaughter houses.

JAMES T. BRADY *and*

A. R. LAWRENCE, JR., *for the plaintiffs.*

First. The act of February 26, 1866, entitled, "An act to create a Metropolitan Sanitary District and Board of Health therein, for the preservation of life and health, and to prevent the spread of disease," is in conflict with various provisions of the constitution of this state, and therefore

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illegal and void. These provisions will be alluded to in order.

Second. The first section of the first article of the constitution provides, "that no member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, *unless by the law of the land or the judgment of his peers.*" And the sixth section of the same article provides "that no person shall * * * be deprived of life, liberty or property, *without due process of law*, nor shall private property be taken for public purposes without compensation."

These phrases have received judicial exposition, and their meaning is clearly defined. Judge COMSTOCK in *Wynehamer agt. The People* (3 Kern. p. 398), says: "The true interpretation of these constitutional phrases is, that when rights are acquired by the citizen under the existing law, there is no power in any branch of the government to take them away; but where they are held contrary to the existing law, or are forfeited by its violation, then they may be taken from him; not by an act of the legislature, but in the due administration of the law itself, before the judicial tribunals of the state."

And Judge BRONSON, in *Taylor agt. Porter* (4 Hill, 145), in reference to the same provision in the constitution of 1822, holds this language: "The meaning of the section seems to be that no member of the state shall be disfranchised or deprived of any of his rights or privileges, unless the matter shall be adjudged against him upon trial had according to the course of the common law."

And Chancellor KENT, in his *Commentaries* (vol. 2, p. 13), says: "The better and larger definition of *due process of law* is, that it means law in its regular course of administration through courts of justice."

(a) The act in question conflicts with both of these sections of the constitution. The provisions of the fourteenth section of the act, gives to the board of health power to destroy any building or other thing, which the said board may regard as a nuisance. In the first place, the board of

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health on *ex parte* statements, determines that the building, etc., is a nuisance, it then orders it to be removed, the privilege being reserved to the owner, occupant or tenant, etc., of appearing before the board and attempting to obtain from them a modification or rescission of the order for the removal or abatement of the alleged nuisance. The board of health in this proceeding does not follow the course of the common law, in the language of Judge BRONSON, nor is it one of the courts of justice of the state, in the language of Chancellor KENT. It exercises a summary jurisdiction unknown to the common law, unknown in the ordinary administration of the law in the courts of this state; decides that a citizen's property is a nuisance, and orders it to be destroyed, without giving to him any opportunity of availing himself of the protection which would be extended to him through the forms which prevail in the courts, or any opportunity of having the question tried by a jury, whether the building or other property, which is the subject of the order of the board of health, is or is not a nuisance.

Third. The seventeenth section of the third article of the constitution provides, that the legislature may confer upon the board of supervisors of the several counties of the state, such further power of local legislation and administration, as they shall, from time to time, prescribe.

(a) We conceive that the above section prohibits by implication, the legislature from conferring powers of local legislation upon any bodies other than boards of supervisors, except municipal corporations and incorporated villages. (*Mayor, etc. agt. Ryan*, 2 *E. D. Smith*, p. 368; *Tamer agt. Trustees of Albion*, 5 *Hill*, 121.) And by the act under consideration, the board of health thereby created, is vested with power to pass by-laws and orders or ordinances, upon subjects which have been heretofore confided exclusively to the cities of New York and Brooklyn, and the supervisors of the various counties embraced in the metropolitan district (§ 20 of act).

Fourth. The sixth article of the constitution prescribes the organization of the judicial branch of the government,

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and the fourteenth section of that article provides that, "inferior local courts of civil and criminal jurisdiction may be established by the legislature in cities; and such courts, except for the cities of New York and Buffalo, shall have a uniform organization and jurisdiction in such cities."

(a) The power of the board of health in determining whether a building or "any other matter or thing," is a nuisance, is judicial. They are constituted a court for the trial of the question of nuisance or no nuisance (14th § of the act). Again, the power to determine whether there has been any violation or resistance by any person in said district of any such law, ordinance or order, and to issue a warrant for the arrest of such person, is a judicial power of the gravest and weightiest character, involving, as it does, the liberty of the citizen. Besides, the legislature, in order that there should be no doubt as to the judicial character and power of the board, has in the thirty-first section of the act declared that "the action, proceedings, authority and orders of said board, shall at all times be regarded as in *their nature* judicial, and be treated as *prim facie* just and *legal*."

Now we conceive that the legislature in the first place has no power to create such a tribunal, and compel individuals to submit their property, rights and privileges as citizens, to its control (*People agt. Mayor, etc.* 42 Barb. 549).

The board of health is not a local court, as constituted by the act in question. Its jurisdiction is not confined to the city of New York or the city of Brooklyn, but extends all over the metropolitan district. Neither is it an inferior court. No appeal is given by the act from its decision. And even if a certiorari would lie to the board, there would be no opportunity to review its decision on the merits.

The powers of the board are more extensive than those of the supreme court, our highest court of judicature, in regard to the matters subjected to its control by the act.

(b) But in the next place, even if the legislature has power to confer judicial functions on the board of health, even if the board can be regarded within the meaning of the constitution, as an inferior local court of civil and criminal juris-

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diction, and as being established in a city, then we say that by the eighteenth section of the sixth article of the constitution, "all judicial officers of cities and villages, and all such judicial officers as may be created by law therein, shall be elected at such times and in such manner, as the legislature may direct."

The commissioners are appointed by the governor and senate, in defiance of this provision.

(c) The case of *Sill agt. The Village of Corning* (15 N. Y. R. 297), is not adverse to this view. In that case the court held that the legislature might create inferior tribunals for villages. It did not hold that the legislature could appoint such officers, nor that it could create a court of such general powers as the board of health in several counties. Indeed, the reasoning of Judge DENIO in that case, goes far to show that the legislature could not constitute such a court as the board of health.

Fifth. The plaintiffs would have been entitled to maintain this action on behalf of all the butchers in the city of New York, in the court of chancery.

(a) The rule in the court of chancery was, that where the parties interested in a question were so numerous as to make it impossible or very inconvenient to bring them all before the court, a part of them might file a bill on behalf of themselves and all others standing in the same relation. (1 *Dan. Ch. Pr.* 183, note; *Robinson agt. Smith*, 3 *Paige*, 222; *Brinckerhoff agt. Brown*, 6 *Johns. Ch.* 139.) And the right of a few to sue in behalf of all, was by no means confined to the cases of creditors and legatees, but the necessity of the case has induced the court frequently to depart from the rule that all parties interested in a question must be joined in the suit brought to determine that question. (See 1 *Dan. Ch. p.* 232; *Kendall agt. Van Rensselaer*, 1 *Johns. Ch.* 349; *Hallett agt. Hallett*, 2 *Paige*, 18-20; *Cullen agt. Duke of Queensburg*, 1 *Brown's C. C. Perkin's ed.* 101 and notes; *Moffat agt. Farquarhson*, 2 *Brown's C. C.* 338, note 1; *Chancey agt. May. Prec. Ch.* 592.)

A bill was allowed where all the inhabitants of a parish

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had right of common under a trust to be filed by one of the inhabitants on behalf of himself and all others (*Blackham agt The Wardens of Coldfield*, 1 Ch. C. 269). And one owner of lands in a township was permitted to sue in behalf of himself and the others, to establish a contributory *modus* for all the lands there (*Chaytor agt. Trinity College*, 3 Anstruther, 841). Also by the captain of a privateer, on behalf of himself and all the other mariners on said privateer, against the owners, for an account and distribution of all the prizes made by the ship (*Good agt. Blewitt*, 13 Vesey, 397).

(b) It was, however, always necessary that the bill should allege that it was filed on behalf of the plaintiff and of all others similarly interested, and if such an allegation was not made, a plea or demurrer for want of parties would lie. (1 *Daniel's Ch. Pr.* 237; *Wood agt. Draper*, 4 Abb. 322, and cases cited.)

Our complaint contains an allegation that the action is brought in behalf of the plaintiffs, and of all others similarly interested, &c (*Complaint*, fol. 15, 8th paragraph).

Sixth. Even if the plaintiffs could not have maintained this action on behalf of all the butchers in the city of New York, under the rules which prevailed in the court of chancery, there can be no doubt of their right to maintain such an action under the provisions of the Code of Procedure.

(a) The 119th section of the Code provides that when the question involved is one of *common* or *general* interest of many persons, or where the parties are very numerous, and it may be impracticable to bring them all before the court, *one or more* may sue or defend for the benefit of the whole.

There are under this provision three classes of cases in which one or more may sue in behalf of the whole.

1st. Where the interest of the parties in whose behalf the suit is brought, in the question involved, is *common*.

2d. Where the interest of the parties in the question involved is *general*.

3d. Where the parties are *very numerous*, and it would be impracticable to bring them all before the court.

Now we contend that this action can be sustained as

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belonging to any and to all of the above classes of cases. It is brought for the purpose of determining whether the board of health has any legal existence, and also to determine whether, conceding that the board has a legal existence, it has the power to compel every butcher in the city of New York to take out a permit for leave to transact his business, and is compellable to drive his cattle at such times only as the board of health may see fit to permit him to do so. The defendants have assumed to pass general ordinances by which they control all these matters.

Surely nothing can be plainer than that all the butchers in the city of New York have a common and a general interest in knowing whether those ordinances are valid or invalid. The ordinances affect and change the whole manner of doing the butcher business in the city of New York. Whether such an ordinance is within the powers of the defendants, is a question of a common and a general interest to all engaged in that business.

Again, it is quite apparent that the parties are too numerous to make it practicable to bring them all before the court.

The complaint shows that there are one thousand butchers in this city.

This brings the action within the third class of cases, in which one is allowed by the Code to sue in behalf of all.

(b) But we are not without judicial guidance on this point. The general term of the supreme court, in the case of *McKenzie agt. L'Amoureux* (11 Barb. 516), decided that the above provision of the Code declaring that when the parties are very numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all, applies indiscriminately to *all actions*, whether they involve common interests or not (*McKenzie agt. L'Amoureux*, 11 Barb. 516).

Even conceding then that the question involved in this case is not one of common interest to all the butchers in New York, it is of general interest, and the parties are too numerous to bring them before the court.

Seventh. The powers of the board of health, conceding

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the act under which it is created to be constitutional, are confined to matters which are purely sanitary, and do not extend to matters which are the subjects of municipal regulation. (*Act, Laws 1866, vol. 1, pp. 121-130, §§ 12, 13, 14; Amendatory Act of April, pamphlet, § 12; Opinion of INGRAHAM, J. Washington Market Case.*).

Eighth. The board of health have no power under the act creating them, to pass the ordinances which are set forth in the complaint.

(a) By the 20th section of the act as amended in April, the board are authorized to enact such by-laws, rules and regulations as it may deem advisable, in harmony with the provisions and purposes of this act, and not inconsistent with the constitution or laws of this state, &c., and shall in like manner make and publish a code of health ordinances for the protection of the public health.

Now as far as the driving of cattle is concerned, we say that it can in no true sense be alleged to be a nuisance which affects the public health or life.

It is true that by an industrious exploration of the records of the police department for many years past, a few cases of accidents arising from the driving of cattle in the streets of the city of New York, have been found.

To speak exactly, the whole number of accidents from 1863 to 1866, which are either distinctly or vaguely verified by the defendant's affidavits have been twelve.

Some of these are supposed cases however, not being positively sworn to. But assuming twelve to be the correct number, the whole number of accidents have amounted to just four a year for the three years last past.

It appears by the affidavit of Jacob W. Moore, presented by the plaintiffs, that during the last seven years one million seven hundred and forty-nine thousand and nine (1,749,009) cattle have been driven through the streets of New York, or very nearly two hundred and fifty thousand head of cattle per year. And yet the defendants can show but four accidents a year from driving such an immense number through the streets.

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Any argument, therefore, which seeks to prove that such a business is, within the meaning of the act, detrimental to life or health, falls to the ground.

The same argument could, with greater force, be used for conferring upon the defendants the power to pass ordinances regulating the running of railroad cars, or omnibusses or carriages on the streets.

The Third Avenue railroad cars alone, injured or killed seventeen persons between October, 1863, and October, 1864, as appears by the report of the state engineer for 1864. And the whole number killed or injured for the same year by railroad cars, was forty-four. And we do not hesitate to assert that more persons are injured from the falling of bricks from the hod during each year than are injured by the driving of cattle.

Ninth. But in the next place the board of health is only authorized to pass such ordinances as are not inconsistent with the laws of the state.

(a) By the charter of the city of New York, the right to establish markets is vested in the corporation, and the supervision of the same in the superintendent of markets, who was formerly the head of a bureau in the city inspector's department, but the bureau was in 1863, transferred to the finance department. (*Charter 1857, § 27; Laws 1863, p. 407 [Tax Levy]; People agt. Lowber, 28 Barb. 65.*)

The plaintiffs, and all the other butchers in the city of New York, have been duly licensed as provided by law, to carry on their business of slaughtering cattle and selling their meat. They have a license for slaughtering from the United States authorities. (*For provisions as to butchers' licenses see Revised Ordinances 1859, pp. 167, 341, 342, &c.*)

It would be in violation of their rights thus acquired, that they should be compelled to take out further permits from the defendants, and inconsistent with the provisions of the charter which are unrepealed.

(b) The provision in the 12th section of the health law as amended, does not aid the defendants, as their control over the markets only relates to their cleanliness, ventilation and

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drainage, and the prevention of the sale of unwholesome articles therein. (*See 12th § as amended; Hoffman agt. Schultz, opinion of INGRAHAM, J.*)

Tenth. The whole subject of granting permits to butchers and the keepers of cattle yards, is a matter of municipal regulation, and can by no fair construction of the act of 1866, be considered as lodged in the defendants.

Eleventh. The same argument which proves that the defendants can compel butchers and marketmen to take out permits for the privilege of carrying on their business, necessarily must prove also that the defendants have power to compel those who are engaged in any kind of business which they choose to declare detrimental to health or life, to take out permits for leave to carry on such business.

Twelfth. The ordinances set forth in the complaint, are not warranted by the act of 1866, and are null and void. Being null and void, as it is clear from the affidavits presented, that their enforcement will either totally destroy or so materially injure the business of the plaintiffs and of all other butchers as to make it useless, the injunction, on familiar principles, should be retained.

Thirteenth. The idea which has prevailed in some minds, that the defendants are not subject to judicial control in the exercise of their power, is erroneous.

The true rule on this subject was laid down by the supreme court in *Barker agt. Rogers* (31 Barb. 447), that the powers of a board of health must be exercised in subordination to the judicial authority of the state, and are subject to be suspended and held in abeyance by the order of a court having jurisdiction of the subject, whenever the principal facts upon which its exercise depends are put in controversy and rendered doubtful, until established by due process of law. (*Opinion BROWN, J. 31 Barb. 447.*)

In this case the affidavits presented on the part of the plaintiffs, show conclusively that the business in which they and the other butchers in New York are engaged, is not a nuisance, and all the main facts presented by the defendants to sustain their position are denied.

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The injunction should, therefore, at least be retained until the issues raised in the case can be disposed of by a trial.

Fourteenth. It is worthy of remark that the defendants do not show in their affidavits, or pretend that a single accident has ever occurred in the city of New York, from the driving of sheep or hogs through the streets of the city.

Fifteenth. The motion to dissolve the injunction should be denied, with costs.

CHARLES TRACY, *for the defendants.*

I. The plaintiffs' demand for an injunction to restrain the defendants from interfering with the business or property of any butcher in New York or Brooklyn, is incapable of support.

Injunctions are given only to restrain injuries to the plaintiff or the plaintiff's rights (*Code*, § 219).

The other butchers who are invited by the plaintiff to come in as co-plaintiffs, but have not in fact come in, are not plaintiffs (*Code*, §§ 117, 119).

The action is not brought for the benefit of all those other butchers, but only such of them as shall come in and share the expenses.

Such an injunction would leave the defendants at their peril to guess who were butchers and who were not.

II. The ordinances in question were duly made by the metropolitan board of health.

(1) The board has power to make ordinances for the "protection of the public health," by virtue of section 20, of the act of 1866, as amended (*Met. Health Act*, p. 33).

(2) It also has all the powers for "preserving or protecting life or health, or preventing disease," given to the New York Common Council, or any municipal or health authorities in the metropolitan district (*Met. Health Act*, § 12, p. 8).

Thus all the power for the protection of life, as well as health, to be found in the charters of New York and Brooklyn, devolve on the board.

(3) The power of the common council of New York to

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make ordinances regulating the driving of cattle, in order to protect human life, is unquestionable. (*Charter*, § 14 [*Davies' Stat.* 175]; *Act of 1830* [*Davies*, 199]; *Act of 1849* [*Davies*, 203]; *Act of 1853* [*Davies*, 210]; 1 *S. L.* 1857, p. 874, § 2.)

Like power has been exercised by the common council repeatedly, by ordinances against fast driving, rock blasting, hoistways, sinks, &c.

(4) The common council of Brooklyn had ample power of that kind, by their charter (*S. L.* 1834, p. 98, § 26). This power has also been exercised repeatedly (*Ordinances*, p. 293, 295, 300, 353).

(5) A discretion is confided to the board, and it is its duty to determine what things need be restrained by ordinances for the protection of life or health. It is a matter of skill as well as discretion.

(6) The requiring of a permit from the board to any person intending to exercise the trade of a butcher, is a proper precaution. No license fee is demanded, but the board deems it needful to the safety of life and health in the district, that a trade which is capable of so much mischief, if negligently conducted, should be in the hands of known and suitable men. The Brooklyn charter specifies this very license.

(7) Ordinances under such powers have been sustained by the courts uniformly. (*The Mayor agt. Williams*, 15 *N. Y.* 502; *The Mayor agt. Ryan*, 2 *E. D. Smith*, 368; *The Mayor agt. Rice*, 4 *Id.* 604; *People agt. Reed*, 1 *Parker*, 481; *City of Brooklyn agt. Cleves*, *Lalor's Sup.* 237; *City of Rochester agt. Collins*, 12 *Barb.* 569.)

III. The constitutionality of the metropolitan health law cannot be disputed.

One judge has pronounced it constitutional; other judges have treated it as constitutional, and not one has held to the contrary.

(1) The delegation of power to make local ordinances is no breach of the constitution, and it has been done by every legislature in the laws concerning cities and villages.

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(2) The power of the board to interpose directly, and order and require the suppression of any thing it finds dangerous to health or life, is clearly constitutional. Such power was vested in the city inspector. (*S. L.* 1850, p. 607. § 1, *sub.* 3; 11 *N. Y. Health Law*, 30.) In other cities the like powers were held (*S. L.* 1850, pp. 691, 692). So in the earlier health laws (*Stat. of* 1823, p. 79, § 39).

(3) These powers have been recognized by the courts. (*Van Wormer* agt. *Mayor of Albany*, 15 *Wend.* 262; *Same*, 18 *Wend.* 169; *Duffy* agt. *The People*, 6 *Hill*, 75; *Morris* agt. *The People*, 1 *Parker*, 44.)

IV. The courts are not authorized to inquire collaterally into the facts upon which the metropolitan board of health makes its determination, within the province of its discretion. (*McLaren* agt. *Mayor of N. Y.* 1 *Daly*, 243, 250, 251, 252; *Van Wormer* agt. *Mayor of Albany*, 15 *Wend.* 262; *People ex rel. Savage* agt. *Board of Health*, 33 *Barb.* 344; *Belcher* agt. *Farren*, 8 *Allen*, 325, 327, 329.)

DALY, F. J. This injunction is claimed to be maintainable upon two general grounds: 1st. That the law organizing the board of health is unconstitutional and void. 2d. That if the law is constitutional, the acts sought to be restrained are not within the sanitary powers conferred by the law. I shall consider these objections in their order. The act creating the board of health is alleged to be in conflict with the constitution of the state. 1st. Because it confers upon the board the right to deprive a citizen of his liberty and of his property, without due process of law. 2d. Because it confers upon the board powers of local legislation, which, under the constitution, it is insisted, can be conferred by the legislature only upon boards of supervisors, municipal corporations and incorporated villages. 3d. Because it confers upon the board judicial powers, in contravention of the sixth article of the constitution, which provides for and limits the judicial department of the government. That portion of the constitution known as the bill of rights, declares "no person shall be deprived of life, liberty or

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property, without due process of law" (*Art. 1, § 6*). And it is urged that the provision in the fourteenth section of the act, which declares that the board of health may remove any building or thing, which in the opinion of the board, is a public nuisance, or dangerous to life or health, is in conflict with this constitutional provision. There is no ground for this assumption. All that is declared by the act is, that the board may remove or abate a public nuisance, which is merely declaring that it may do what, by the law, a private person may do. It was an established rule of the common law, long before the bill of rights was enacted, that a public nuisance might be removed, taken away or abated, by any person aggrieved thereby, if in so doing he did not disturb the public peace; and that he was not compelled to resort to legal proceedings for its removal. (*Penruddock's Case*, 5 *Coke*, p. 101; *Batten's Case*, 9 *Id.* 54; *Finch's Law Books*, 3 *ch.* 2, p. 188; 2 *Lilly's Abm.* 305; *Reeves' History of the English Law*, vol. 1, 344; vol. 3, 27, 112.)

It is classed by *Wood*, in his institutes (*B. 4, c. 3*), among the remedies which a man has without suit; and the reason, says *Blackstone*, why the law allows this private and summary method of doing one's self justice is, because injuries of this kind require an immediate remedy, and cannot wait for the slow progress of the ordinary forms of justice (3 *Com.* 9). As this was a remedy which was always available without the process of the law, it was no violation of the constitution for the legislature to declare that the board of health might make use of it; and the enactment declaring that they might do so, was no new exercise of legislative authority. More than fifty years ago, the body then known as the commissioners of the health office, were authorized by the act of March 30, 1801, to order the removal, abatement or discontinuance of any manufactory, trade, work, business or repository, which, in their judgment, was a nuisance, or by which, in their opinion, the public health or that of individuals might be endangered; and if it were not removed within the time limited by them, then, upon their representation, the mayor or recorder was required to issue

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a warrant commanding the sheriff to cause the removal or abatement of the nuisance forthwith. (1 *Rev. Laws*, 1801; *R. and R.* p. 373, § 32.)

And by the act of March 26, 1813, the board of health might cause any cargo or part of a cargo to be destroyed, which, in their opinion, was dangerous to the health of the city (2 *Rev. Laws of 1813*, p. 534, § 25). These provisions continued in force down to the adoption of the Revised Statutes; and by the Revised Statutes, the board of health, or the mayor and commissioners of health, might cause to be destroyed any matter or thing within the city dangerous to the public health, when they should judge it to be necessary (1 *Rev. Stat.* 441, § 3). The power of the legislature to do so, it would seem, was not questioned during this long period; on the contrary, it was distinctly recognized in the case of *Van Wormer agt. The Mayor, &c., of Albany* (15 *Wend.* 262).

“The several acts of the legislature,” said Chief Justice SAVAGE, “confer upon the board of health very large discretionary powers, among other things, concerning the suppression and removal of nuisances. It is right that such a power should exist somewhere, to be exercised upon the proper emergency. If the civil authorities were obliged to await the slow progress of a public prosecution, the evil arising from nuisances would seldom be avoided;” and it was held in that case, which was an action of trespass for pulling down certain buildings, which the board of health caused to be removed as a nuisance, during the prevalence of the Asiatic cholera in Albany, in 1832, that the plaintiff could not show in the action that the premises were not a nuisance, the point having been adjudicated upon by the proper tribunal, the board of health. The decision was, in fact, that the action of the board could not be questioned in a collateral proceeding. It may be reviewed to a limited extent upon a writ of *certiorari* (*Ex parte Mayor of Albany*, 23 *Wend.* 27); and should it order the removal of any matter or thing, in a case where it clearly has no authority, the court may interpose and stay its action, as was held by Jus-

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tice INGRAHAM, in the recent case of *Hoffman* agt. *Schultz*, in the supreme court of this district. The present act goes further than the rule of the common law, or the act of 1801 required, for the protection of the property of the citizen, by providing that except in cases of imminent danger from pestilence, notice shall be given to the party to be affected, and an opportunity afforded to him to be heard, before the order of the board is executed ; and the legislature having made this provision, courts of justice should act with great caution in interfering with the proceedings of such a body, and interpose only in a case when it is very plain that they are clearly acting without any authority.

It is further urged, that the authority given to the board to order the arrest by warrant, of persons violating the provisions of the act, or the regulations or ordinances of the board, is in conflict with the provision of the constitution, declaring that no person shall be deprived of his liberty without due process of law. The deprivation of liberty here referred to, does not mean the arresting of a person to bring him before the proper judicial tribunal upon the accusation of crime, for that may be done in certain cases without warrant, where one is taken in the act of committing a felony or a breach of the peace, or by an officer upon a reasonable suspicion of having committed a felony (2 *Hawks. P. C. ch. 12*, §§ 19, 20 ; 2 *Inst.* 186) ; or where it is allowable by the custom of particular localities (*Mackally's Case*, 9 *Coke*, 65 b). The meaning of the words *without due process of law*, in this connection is, that no one shall be condemned to lose his liberty, unless by the presentment or indictment of a grand jury, and a regular trial according to the course of the common law. The words of magna charta, *by the law of the land*, and the words, *without due process of law*, both of which are used in our constitution, mean, according to Lord COKE, the same thing, pertinent of good and lawful men (2 *Inst.* 50). And Chief Justice RUFFIN, in referring to one of these synonymous terms, in the elaborate opinion which he rendered in *Hoke* agt. *Henderson* (4 *Dev. N. C.* 15), declares that it meant depriving a citizen of the rights of person or pro-

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perty without a regular trial, according to the course and usage of the common law ; and that that is undoubtedly the meaning of these terms, will be apparent upon a perusal of the early English statutes in relation to personal liberty, the object of their enactment being to prevent a man being deprived of his liberty or of his property, as Blackstone has expressed it, without accusation or trial. The arrest which this act allows upon the warrant of the board, is simply to bring the offender before a magistrate. The fourteenth section declares, that the order of arrest shall be executed as a warrant from a justice or judge, and that the party arrested shall be taken before a magistrate, and treated thereafter as having the *rights* and the liability of a party under arrest for a misdemeanor, a procedure which in no way deprives the accused of the rights secured to him by the constitution.

The next objection is one that scarcely calls for a serious reply ; that the act of the board forbidding butchers to drive their cattle through the city, except at certain specified hours, is under the constitution, depriving them of their property. What the constitution means is, the taking away of a man's property. The act of the board here simply regulates the manner of the use of it, so far as the interests of the public are concerned. This the constitution nowhere interdicts. Our statute books abound with laws of this description, and without them the ordinary objects of civil government could not be effected. In *Bosworth agt. Hearne* (*Cases Temp. Hardwicke*, 405, *Andr. R.* 92), a regulation of this kind was held to be one that a municipal corporation might enact.

The twentieth section of the act empowers the board to enact such by-laws, rules and regulations, as it may deem advisable, in harmony with the provisions of the act, and not inconsistent with the constitution and laws of the state, for the regulation of its action, and that of its officers and agents, in the discharge of its and of their duties, and for the protection of life and public health, and to alter, annul or amend the same from time to time ; and it requires the board to make and publish annually, a "code of health

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ordinances," for the protection of the public health, and requires all courts and tribunals, and any judges or justices thereof, to take cognizance of, and give effect to them, and that they may be enforced by a penalty not exceeding fifty dollars, to be recovered in any justices or district court.

It is said that the power to make law is vested by the constitution in the senate and assembly, and that it cannot be delegated, except to the bodies named in the constitution, cities, incorporated villages and boards of supervisors. There is no express provision prohibiting the legislature from empowering public bodies or corporations to enact and enforce by-laws or ordinances for local purposes; but it is argued, because the constitution declares that the legislature may confer upon boards of supervisors such further powers of local legislation and administration, as they shall from time to time prescribe, and have made it the duty of the legislature to provide for the organization of cities and incorporated villages (*Art. 3, § 17; Art. 8, § 9*), that it follows by implication, that the naming of these bodies is an indication that it was not to be extended to any others; but the maxim *expressio unius est exclusio alterius*, as was said by Justice WILLARD in *Barto agt. Himrod* (4 N. Y. R. 492), is more applicable to deeds and contracts than to a constitution, and requires great caution in its application in all cases. The legislature is the depository of the original, exclusive and sovereign power of the people, except so far as it is restrained by constitutional enactments; and to warrant the conclusion, where there is no express prohibition, that any part of it is taken away by natural implication, the intention should be as plain as if it had been expressed in words. "The power of a state legislature," says CUSHING, "is general and unlimited, and extends to all subjects of legislation, except in those particulars wherein it is expressly restrained; consequently, when a question arises, whether a given subject is within the constitutional power of a state legislature, the inquiry should be not whether it is conferred specifically, but whether it is withheld in terms, or by necessary implication. If it cannot be said affirmatively, that the power in

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question is withheld, then it exists under the general grant. If the inquiry leads merely to a doubt of the power, the doubt is in favor of its being granted" (*Cushing on the Law of Legislative Assemblies*, § 717, I. p. 282). The legislature constantly exercises the powers of conferring upon local bodies created for public purposes, the authority to make and to enforce by-laws or ordinances. From the year 1794 down to the time of the revision of the constitution in 1846, numerous acts had been passed by which various public bodies, the common council of New York, the commissioners of the health office, the commissioners of health and the board of health, first established in 1804, were empowered to make rules and regulations for the protection of the public health, which were enforced with the effect of law. By the act of April 9, 1804, masters of vessels violating any of the regulations made by the commissioners of the health office, were declared to be guilty of a misdemeanor; and an analogous provision in relation to the orders and regulations of the health commissioners, was contained in the act of March 6, 1813. All these bodies were created by statute, and underwent many modifications and changes, in the course of subsequent enactment; but this piece of local legislation, as it has been called, or the right to adopt rules, regulations or ordinances, which were enforced as laws, for the preservation of the public health, was continued through the many changes and modifications in these bodies, and was of a very comprehensive character. (*Laws of New York*, 1794, 3 *G.* 149; 1796, *Id.* 308; 1797, *Id.* 368; 1798, *J. & A.* 403; 1799, *Id.* 587; 1802, 1 *K. & R.* 361, 369, 372; 1804, 3 *W.* 469; 4 *W.* 43, 410, 460; 2 *Rev. Laws of 1813*, pp. 524, 533. 1 *Rev. Stat.* 422, 440, 441; *Laws of 1832*, p. 582, § 5; *Laws of 1820*, pp. 607-8, *Art.* 1.)

In 1828 the legislature conferred upon the trustees of the village of Albion, the right to make such prudential by-laws, rules and regulations, from time to time, as they should deem proper; and an action having been brought against the trustees for enforcing a by-law against bowling alleys, the question came up whether the legislature could confer upon the

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trustees the right to make such local laws, and Justice COWEN disposed of it in these words: "It is said the constitution gives the legislative power to a senate and assembly, which cannot delegate the right to make laws. The answer is, that the words of the constitution comprehend and imply all the accustomed and acknowledged powers of legislation; among these is the power to create municipal corporations, with the right to pass by-laws for local objects" (*Tanner agt. The Trustees of Albion*, 5 Hill, 130.)

The legislature having exercised a power of this nature for more than half a century, it would require something more explicit than the provision in the constitution upon which the plaintiffs rely, to show that it was the intention of that instrument to restrict, abridge or take it away. If it had been restrained under previous constitutions, then there would be ground for holding that a declaration in the constitution, that the legislature might confer it upon boards of supervisors, should be regarded as a constitutional permission which was limited to such bodies alone; but the legislature, as I have said, is the depository of the sovereign power of the people, except so far as it is restricted by the constitution, and it does not necessarily follow, because the constitution says that the legislature may confer a power upon the board of supervisors, that it is to be taken as a constitutional prohibition against their conferring it upon any other body which they may think it expedient, thereafter, for public purposes, to create. "The conflict between a statute and a fundamental law," said Judge EMOTT, in *The People agt. The Board of Supervisors* (27 Barb. 593), "must be plain, beyond any reasonable doubt, before we convict the legislature, and annul their laws. These are obvious truths, which have been again and again repeated by court and judges, who have, perhaps, not in all cases, acted up to their requirement. Neither must it be forgotten that the power of the legislature is not derived from, nor conferred by the constitution of the state. That instrument does indeed organize a legislature, and transfer to them the power of legislation of the people of the state. But it does not

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create the power, but only the instrument for its exercise. The power is the sovereign power of the people, and in a political and juridical sense, it is omnipotent and irresponsible, except where it is expressly restrained by the organic instrument. The constitution of the state is to be resorted to not to see what powers are conferred upon the legislature, but what are withheld ; not how they are authorized to act, but in what respect they are restrained or forbidden to exercise power. Such restrictions and limitations ought to be clear and explicit. There is a wide distinction between such an instrument and a grant of limited powers like the constitution of the United States."

It was held in *The People agt. Draper* (15 N. Y. R. 533), that the legislature might constitutionally establish new civil divisions of the state, embracing the whole or part of different counties, for the general purposes of government, which in that case had been done by forming the counties of New York, Kings, Westchester and Richmond, into the metropolitan police district, under commissioners, to whom were transferred powers previously exercised by bodies or officers in these different counties. It was held that there was nothing in the constitution which required that these local functionaries should always possess the same functions as when the constitution was adopted ; that changes might be made by which power might be taken from the one and given to the other. "If we were to establish the principle," said C. J. DENIO, "that the legislature can never reduce the administrative authority of counties, cities or towns, can never resume in favor of the central power any portion of the jurisdiction of these local divisions, or change the partition of it among them as it existed when the constitution was adopted, we should, I think, make an impracticable government. It is the business of the legislature to adjust, in the interest of the whole people of the state, the distribution of the powers of government, taking care that no direct provision of the constitution is violated, and that no arrangement which it has made is incidentally disturbed."

The legislature followed a like course in creating the

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present board of health, embracing the same territorial division of the state, and conferring upon a board of commissioners powers which had before been exercised by public bodies or officers within these respective counties. They had the right to do this; and there is nothing in the constitution, in my judgment, which deprives the legislature of the authority to confer upon the board the power to make by-laws, rules, regulations and health ordinances.

The next objection that the law is unconstitutional, because it confers upon the board judicial powers, is equally unfounded. Even if such were the fact, it would not render the law unconstitutional. The court of appeals have decided in *Sill agt. The Village of Corning* (15 N. Y. 297), that there was nothing in the constitution prohibiting the legislature from creating new courts; that they could not create courts of the like jurisdiction, or fulfilling the same general purposes as the courts for which the constitution had made provision; but that beyond that, the power of the legislature was unlimited; and they held that an act creating a local court for the village of Corning was constitutional and valid. All that the legislature have done in this case, has been to authorize the board, by its warrant, under its seal, and attested by the signature of its president and secretary, to order the arrest of any person resisting its order, or violating any law, ordinance or order of the board, having first entered upon its minutes or filed in its records, what it may regard as adequate proof of such violation or resistance, and the person so arrested is to be taken before a magistrate, and treated as a person under arrest for a misdemeanor of the nature indicated by the order of the board.

This is simply giving the board jurisdiction to order the arrest of offenders against the provisions of the act, or the regulations, orders or ordinances of the board; and this the legislature has the right to do, there being nothing in the constitution which expressly, or by natural implication, prohibits them from doing. Chief Justice DENIO, in declaring in the case just quoted, that the legislature had the power to create a court in the village of Corning, says: The

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maxim, *expressio unius est, exclusio alterius*, has no application to the case of local tribunals, established for the purpose of redressing a certain description of grievances, in particular limited localities. The state, as to subjects of a domestic nature, is a sovereign political power, and the legislature can provide such agencies for the administration of the law and the maintenance of public order as it shall judge suitable, where no prohibition expressly made or necessarily implied, is found in the constitution. The provision in the fourteenth section, that the action, proceedings, authority and orders of said board shall be regarded as in their nature judicial, and be treated as *prima facie* just and legal, was also, upon the authority of the case above quoted, within the power of the legislature to enact.

This disposes of all the constitutional objections which have been taken to this act; and holding it, as I do, to be constitutional and valid, it remains now but to consider whether it has conferred upon the board the power to do the acts which this injunction was granted to restrain. The first is the prohibition in the forty-fifth section of the health ordinances, that no cattle shall be driven in the built up portions of New York or Brooklyn, except during certain specified hours, and then only in certain numbers, and shall be driven in streets and avenues leading to their destination, where they will least endanger the lives of human beings. The powers of the board are very extensive. The object of the act as expressed in its title, is "to create a metropolitan sanitary district and board of health therein, for the preservation of life and health, and to prevent the spread of disease;" and to accomplish the object of its creation, all the authority, duties and powers, possessed by bodies and public officers previously existing in the district, for the purpose of preserving or protecting life or health, or preventing disease, are conferred exclusively upon the board, to be exercised as set forth in the act, to such an extent, and in such place and manner as the board may provide, for the greater protection and security of health and life in the district, and the appropriate parts of it. If the driving of cat-

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tle through the city be at all attended with danger to life or health, a regulation of this kind by the board is clearly within the powers conferred upon them. This has been shown upon the motion ; and though numerous affidavits by butchers long established in business in this city have been read, to the effect that they have never known or heard of any accidents in this city arising from such a cause, there has been evidence adduced on the part of the board, showing that such accidents have occurred during the past two years, and that the breaking loose and running through the streets of wild or mad cattle, to the danger of the lives of citizens, has been not of unfrequent occurrence. This is sufficient to show that the subject is one within the jurisdiction and power of the board, and that they have a right to make such a regulation respecting it.

The next is the provision in section thirty-nine of the ordinances, that no person shall become, continue or engage in the business of a butcher, cattle dealer, or vegetable dealer, at or in any public or private market or stand in New York or Brooklyn, without a permit from the board. This is a more doubtful power. From the earliest colonial period the corporation of the city of New York, by virtue of the municipal authority with which it was invested as a body politic and corporate, exercised the right of determining who should be butchers, within what part of the city or corporate limits cattle might be slaughtered, and ordinances were passed forbidding any one to follow the calling of a butcher without the consent or license of the city authorities. An ordinance of this character existed under the Dutch as early as 1656 (*City Records*) ; and under the first of the English governors in 1665, butchers were required to take an oath that they would slaughter no cattle without "a ticket of consent," or as one would express it, a permit from the agent of the corporation (*City Records*). This exercise of corporate authority was specifically confirmed both by the Dongan and the Montgomery charters, in the first of which instruments, after a confirmation of all their previous powers, the corporation were authorized to pass ordinances for the good

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rule, oversight, correction and government of the several tradesmen, victuallers, &c.; and by the Montgomery charter, ordinances for declaring how the inhabitants should "use, carry and behave themselves," in their functions and business (*Kent's Charter*, pp. 10, 26, 93). And the corporation would have possessed the power if there had been no such grant, for a municipal corporation may regulate the manner of carrying on any trade or business within the municipality, so far as to prevent monopoly, the sale of unfit commodities, and to insure proper conduct in those who practice it (*Willcock on Municipal Corporations*, 141). Thus, it has been held that a by-law that there should be no butchers or tallow chandlers in a particular street, or that no butcher should slaughter any beasts within the walls of a city, or expose fresh meat for sale within certain limits, or upon a particular day, or excluding brewers carts from the streets during certain hours, were not laws in restraint of trade, but public regulations, which a municipal corporation had the right, if they thought proper, to establish. (*Pierce agt. Bartrum*, Cowp. 270; *Player agt. Jenkins*, 1 Sid. 284; *Bosworth agt. Hearne*, Cases Temp. Hardwicke, 405; *Andrews' R.* 92; 2 *Strange*, 1085; *The Butchers' Company agt. Morey*, 1 H. Bl. 370; *Comyn's Digest*, Action on the Case for Nuisance, c.) The corporation of the city of New York, from the year 1676 to 1789, passed various ordinances, by which at first cattle were required to be slaughtered outside the city wall, the present Wall street, then at the public slaughter house, the location of which was gradually removed by successive enactments as far as Corlear's Hook, when being found productive of great inconvenience to the butcher and to the citizen, the public establishment was abandoned, and the butchers from that time forward, were allowed to have their own private slaughter houses (*De Voe, The Market Book*, vol. 1, pp. 54, 81, 264, 297, 368). By the act of April 9, 1813, section 272, the corporation were empowered to regulate the butchers of the city of New York, to prohibit and restrain them from carrying on their business at any other times and places than such as might be designated

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for that purpose by the common council, and to prohibit and restrain all and every person or persons, other than licensed butchers, from carrying on the business or calling of a butcher, or any part or branch thereof, within the limits of the city; and a similar law was passed in 1834 for the city of Brooklyn, the validity of which, and of the ordinances under it, was sustained in the case of *The City of Brooklyn agt. Cleves* (*Lalor's R.* 231). The corporation of New York, by repeated ordinances, have carried out these provisions, by providing that no person shall exercise or carry on the trade or business of a butcher in the public market under the penalty of \$50, unless licensed by the mayor, or permitted to do so by the authority of the common council; together with numerous regulations as to the time when, and the place where, meat may be sold; the kind or quality; the weights and measures to be used; prohibiting the sale of any article or thing in the public market without a registered permit; enactments against forestalling, and other enactments too great in number to be here enumerated; the rigid compliance with which is enforced by the enactment of numerous penalties (*Revised Corporation Ordinances of 1845, from page 91, to 117*).

This power of determining who should be butchers, and how and where their trade should be carried on, had its reason, no doubt, in the prejudicial effect which such occupation might have in compactly built cities, upon the public health, if not properly conducted, but not wholly so. It was but a part of that general power which municipal governments have exercised from their earliest institution, over all trades or occupations, so far as they affected the public interest, and which is essential for the preservation of good order and the general purposes of government. So far as this power relates to the protection of life and health, or the prevention of disease, it is taken away by this act from the corporations of the cities of New York and Brooklyn, and "*conferred exclusively*" upon the board of health, by whom, after the passage of the act, it is to "be exclusively exercised," and with it is necessarily granted all such inci-

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dental power as may be requisite to give effect to, and carry out the intent of the legislature. Whether this grant is broad enough to empower the board to declare that no man shall carry on the business of a butcher without their permission, is a point upon which I confess, I entertain considerable doubt. This power existed in the corporations of New York and Brooklyn; and if the defendants possess it, they possess it exclusively, for whatever power has been transferred to them is vested in them exclusively. It cannot exist in both bodies; and if, as the defendants assume, it has passed to them, the license of the mayor is unavailable, as it would be of no effect or use without the permission of the board of health. If the board possess this power alone, then much of the legislation referred to, of the corporations of New York and Brooklyn upon the subject of butchers and markets, would be abrogated; and as those ordinances were designed to accomplish other objects besides the preservation of health and the prevention of disease, it would be very difficult to determine what part of them remains, and what portions have ceased to exist. But it is not essential that I should pass upon this question in this action. The plaintiffs ask that the board of health should be enjoined from compelling them or any butchers to take out permits to carry on their business, and this the plaintiffs are not entitled to, as they have ample legal remedy if the defendants have no authority to make such an ordinance, and should undertake to enforce it. If arrested by the warrant of the board for refusing to comply with the provision, an ample opportunity is afforded to avail themselves of this defense, and there is no reason why a court of equity should interpose by injunction.

The plaintiffs set forth that they are informed and believe, that the defendants threaten and give out that they intend to compel the removal of the slaughter houses of all the butchers in the city of New York to some remote part of the island of New York, and that if this threat is put into execution, they and the butchers generally will sustain great injury. The act declares that the powers conferred upon

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the board for preserving health and life, or for preventing disease, may be exercised *to such an extent and in such a manner as they may provide*, for the greater protection and security of health and life in the district; and if the board have, or should determine that such an act is necessary for that purpose, I think any court of justice would and should hesitate to interfere with the decision. It is made by the legislature, the tribunal to determine to what extent, and in what manner its powers are to be exercised for the greater protection and security of health and life in the district which the statute has created; and though its determination upon such a subject may not be beyond control, little short of the abuse of its powers, or a case where it was palpably acting without authority, would justify an interference upon the part of the courts. The course of legislation from 1801 to the present time, has been to confer upon bodies of this description large discretionary powers, to be exercised upon emergencies for the public welfare. They have been authorized as I may express it in general terms to do or cause to be done, whatever might be necessary for the preservation of the public health; and if the present board have come to the conclusion that the removal of the slaughter houses, as suggested, is necessary for that purpose, it is certainly a matter upon which they may fairly exercise their judgment, and with the fair exercise of it no judicial tribunal should interfere. (*Birdsall agt. Phillips*, 17 *Wend.* 164; *Allyn agt. The Commissioners of Highways of Schodack*, 19 *Id.* 342; *Simpson agt. Rhineland*, 20 *Id.* 103; *Ex parte Mayor of Albany*, 23 *Id.* 277.) Of the propriety of this course on the part of this court as a judicial tribunal, I entertain no doubt, while at the same time I doubt exceedingly the utility or necessity of the removal of all the slaughter houses, in the manner proposed, as a measure essential to the preservation of the public health; for a slaughter house is not in itself a nuisance, though it may become so by the manner in which it is conducted. I find but one reported case in which a slaughter house was indicted as a nuisance, and that was one for the slaughtering of horses (*Rex agt. Cross*, 2 *C.*

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& P. 483), while the books abound with proceedings for the removal of other trades or manufactories as nuisances. Mr. Thos. De Voe, in a paper read before the Polytechnic Association of the American Institute, has collected many facts upon this subject, and among others, he refers to a letter of Dr. Hosack, an eminent physician, who writing in 1822, during the prevalence of the yellow fever in this city, notices as remarkable, that in the north-eastern part of the city, occupied by the slaughter houses, though the air was loaded with the offensive vapors arising from the decomposition of blood and the other offal of these establishments, yet the streets there were remarkable for their salubrity, and had in no instance been the seat of pestilence, even when it was prevailing in the vicinity of the wharf; also to similar experience in Rio Janerio, during the severe yellow fevers which prevailed there in the years 1851, 1852 and 1853; to the testimony of Dr. Smith, before a committee of the New York Assembly, in 1865, declaring that in the seventeenth ward of the city, inhabited chiefly by the wealthier classes, and where there are fifty-six slaughter houses, the per centage of death was seventeen in one thousand, or that of a rural town, while in the fourth and sixth wards, where there are no slaughter houses, it is very large, being from thirty-five to forty in one thousand; and to the report of a committee of the national institute of France in 1805 (9 *Med. Repository*, 341), who after investigation of the subject, declare that slaughter houses are not injurious to the health of the vicinity, where they are properly conducted. These facts, together with the absence of reported cases in the books of proceedings or actions against such establishments as nuisances, would seem to indicate that they are not necessarily prejudicial to health, although otherwise offensive and unpleasant. An action for a nuisance, says *Comyn*, a very great authority in the law, will not lie against a butcher for the use of his trade, though it be to the annoyance of his neighbor, for it is but a reasonable exercise of his right if he use his trade in a convenient place (*Comyn's Digest, Action on the Case for a Nuisance* [c.]). Butchers, by municipal regulations, might be

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required to carry on their business in a convenient place, but not necessarily for the reason that it is injurious in its nature to the public health, but because there are parts of a city especially devoted to residences, the comfort and enjoyment of which would be lessened by the unpleasant odors arising from such places, when they can as conveniently be located elsewhere.

Of the supervising power of the board of health over slaughter houses, and of its right to enact and enforce such regulations as will secure their being conducted in such a manner as to prevent any injury to the public health, there can be no doubt, and the board would even be restrained from doing this by the very general terms of this injunction.

The motion to dissolve the injunction must, therefore be granted.

SUPREME COURT.

L STANDARD BETTIS, appellant agt. LEWIS A. GOODWILL,
impleaded, &c., respondent.

In an action for the *foreclosure of a mortgage*, where there was a part of the principal sum not yet due, the amount of which was admitted by the pleadings, and the mortgagor—one of the defendants, with his answer, served an *offer* to allow judgment to be entered herein against him, decreeing due on the bond and mortgage mentioned in the complaint the sum of \$105, and interest thereon from this date, and for judgment of foreclosure and sale herein with costs, which offer was not accepted by the plaintiff, and on a reference it was ascertained that at the time of the offer there was but \$68 due on the bond and mortgage: Held that the plaintiff was entitled to costs, notwithstanding the offer (MARVIN, J. dissented).

The offer was insufficient, because it did not propose that the judgment should *adjudicate the amount not due*, as agreed upon in the pleadings, or that such amount should be paid either in whole or in part out of the proceeds of the sale, and thereby save a special application to the court for that purpose.

Erie General Term, September, 1866.

Before GROVER, P. J., MARVIN and DANIELS, Justices.

THIS action was brought for the foreclosure of a mortgage. The complaint alleged that \$129.47, had become due upon

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the bond and mortgage in suit, and that \$250 was then to become due. It also alleged that the mortgaged premises could not be sold in parcels, and claimed judgment for the foreclosure of the mortgage and a sale of the mortgaged premises. The mortgagor in his answer denied that the amount alleged was due, and that the premises could not be sold in parcels. He also alleged certain payments and counter-claims by way of defense. With this answer there was served an offer, that the plaintiff might take judgment decreeing due on the bond and mortgage the sum of one hundred and five dollars, and for judgment of foreclosure and sale, with costs. This offer was not accepted by the plaintiff. And upon the trial of the issue the referee reported due on the bond and mortgage at the time of the offer, the sum of sixty-eight dollars. He also reported that the premises could not be sold in parcels. Upon the adjustment of the costs, the clerk allowed them to the defendant from the time of the offer. The plaintiff appealed from this adjustment to the special term, where the ruling of the clerk was affirmed. And from the order affirming it he appealed to this court.

I. A. PARSONS, *for appellant.*

D. SHERMAN, *for respondent.*

By the court, DANIELS, J. The papers furnished upon the argument of the appeal in this cause, do not contain the offer of judgment served by the defendant who gave the mortgage. But as they disclose that the offer was used with the pleadings, on the adjustment of the costs by the clerk, and on the hearing of the appeal before the special term, there will be no impropriety in looking into the printed case furnished to this court when the appeal from the judgment was heard, for the purpose of ascertaining its contents. By the offer, as it is contained in that case, the mortgagor offered "to allow judgment to be entered herein against him, decreeing due on the bond and mortgage mentioned in the complaint, the sum of one hundred and five dollars and interest

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thereon from this date, and for judgment of foreclosure and sale herein, with costs." This offer was dated the fifteenth of March, 1864.

According to the report of the referee before whom this cause was tried, the plaintiff was entitled at the time of serving this offer, to recover as already due, the sum of sixty-eight dollars, which was less than the amount offered, and to a judgment directing a sale of the entire mortgaged premises, for the satisfaction and payment of the amount to become due, as well as that which was due. Under a judgment on that report, the plaintiff would, therefore, be entitled to retain out of the proceeds of the sale an amount sufficient to pay that which was due, and the sum to become due, when the offer was served. Whether the plaintiff would have been entitled to enter such a judgment if he had accepted the offer served, is the substantial question presented by this appeal.

The admission of the allegation in the complaint that two hundred and fifty dollars were to become due on the bond and mortgage, arising out of the omission of the answer to deny it, did not entitle the plaintiff to judgment directing its payment out of the proceeds of the sale, without a special application to the court. In that respect it was very much the same in effect as the admission which parties make by allowing the case to go by default for want of an answer, or by serving a demurrer that may properly be overruled. Although the complaint stands substantially admitted, yet the plaintiff is compelled to apply to the court for judgment, before he can enter it, unless the action is on a contract for the payment of money only (*Code*, §§ 244, 247, 269). That was legally the effect of the admission by the pleadings in this case. For the purposes of the action, it was conclusive evidence of the truth of the allegation in the complaint, but that did not dispense with a special application for judgment on that part of the case. And no proceeding is provided by the present system, dispensing with that application in an action to foreclose a mortgage, except the offer which the defendant was at liberty to serve.

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Without a direction in the judgment that the amount secured and yet to become due, should be paid out of the proceeds of the sale, it would be the duty of the officer making such sale to pay that part of the proceeds into court. From which the plaintiff would be entitled to receive it only on a special application for that purpose. Under a simple adjudication of the amount due on the bond and mortgage, together with a foreclosure and direction to sell the mortgaged premises, the officer would have no right to pay the plaintiff any thing beyond that, except the costs and expenses.

The offer in this case offered a judgment decreeing due on the bond and mortgage mentioned in the complaint, the sum of one hundred and five dollars and interest, and for a foreclosure and sale with costs. This did not propose that the judgment should adjudicate the amount not due, as agreed upon in the pleadings, or that such amount should be paid either in whole or in part out of the proceeds of the sale. The only judgment it offered, besides the foreclosure and sale, was one determining the amount mentioned to be due on the bond and mortgage. The circumstance that the pleadings admitted the amount to become due, did not change the language or effect of the offer, for that would not justify the plaintiff in taking the proper judgment providing for its payment. Nothing less than a specific offer allowing that to be done, or a special direction of the court, could have that effect. This offer, so far from offering a judgment directing the amount not due to be paid out of the proceeds of the sale, makes no allusion whatever to that feature of the case. It proposed a judgment for one single purpose only. The recovery of the sum mentioned as due, and the satisfaction of it, with the expenses, by a sale of the premises. This is all that the plaintiff could have recovered by accepting it. For the clerk in entering judgment would be concluded in his action by the terms of the offer. While he might look into the pleadings for the purpose of ascertaining the proper construction to be placed upon such terms, he certainly would not be at liberty to do it, to incorporate

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within them the effect of the admissions those pleadings might be found to contain. Where the party making the offer fails to embody in it such relief as the admissions in the pleadings show the other party entitled to, the clerk has no power to correct or enlarge it in that respect. He is required to act according to the offer. That confers his authority upon him, at the same time defining and limiting its extent (*Code*, § 385).

The offer served in one respect, offered a judgment more favorable than that which the plaintiff recovered. For it offered a larger amount due than the referee found by his report. But in another respect, and that much the most important, because the amount was greater, it was less favorable than the report of the referee entitled him to enter. Upon the whole case the judgment was more favorable, because it allowed him to recover from the premises the whole of the mortgage debt, though to some extent reduced in amount as to the sum actually due when the offer was made.

The object of the offer is to secure to the party on whom it is served, an adjudication of his legal rights in the action without the intervention of a trial. And for that purpose it is a highly beneficial element of practice in the progress of litigated proceedings, which deserves the protection and encouragement of courts of justice. Its tendency is to abridge and arrest legal controversies, by diminishing their expenses and avoiding the complications and perplexities often attending trials before the court. To promote the object designed to be accomplished by the offer, it should be required to be couched in clear and explicit language, leaving no reasonable grounds for controversy or misunderstanding, respecting the relief proposed by it, or the judgment the party would be entitled to enter upon the acceptance of it. Otherwise it will often be doubtful whether the party can safely avail himself of it, and further litigation will become necessary before that question can be determined. In such cases the offer will frequently become a snare instead of a benefit, as the law designed it. For by rejecting it when by a very

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close construction of its terms it might include all the relief the party afterwards proved himself entitled to recover, he would subject himself to the costs of his adversary from the time of serving the offer ; while by accepting it where a subsequent determination should ascertain it to be too contracted in its terms for the real justice of the case, he would necessarily be deprived of so much of such rights as the offer failed to include. This would have the effect of rendering the offer an instrument of positive injustice in many cases.

These offers should be construed most strongly against the party making them, for they are always made in language of his own selection. But when so construed, if the offer still proves to be so ambiguous, uncertain or indefinite, as to leave it doubtful whether it includes an offer of all the relief the party receiving it is justly entitled to recover ; the party serving it has no good ground of complaint, if he is afterwards compelled to pay the costs of a litigation which he had it in his own power to avoid by merely using language so plain as clearly to comprehend all that the other party was entitled to demand.

The order appealed from, and the adjustment of the costs by the clerk should be reversed, and the clerk directed to allow to the plaintiff such costs as he may be entitled to recover under the judgment.

GROVER, P. J., concurred.

MARVIN, J., dissented.

SUPREME COURT.

HERMANOE agt. JAMES.

Where the complaint alleged that "the defendant, contriving and wickedly and unjustly intending to injure the plaintiff, and to deprive him of the affections, comfort, fellowship, society and assistance of Rachel his (plaintiff's) wife, did, at, &c., wrongfully and unlawfully purpose, plan and undertake to alienate the affections of his (plaintiff's) said wife ; and did then and there, for the accom-

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plishment of such purpose" (by various professions and pretences set forth), "and by false insinuations against the plaintiff, and by other insidious wiles, to prejudice and poison the mind of the said Rachel, against the plaintiff, and so far alienate her affections from her said husband, as to induce the said Rachel to desire and seek to obtain a divorce or separation from the said plaintiff; and that the defendant on or about the first day of February, 1866, did counsel, advise, aid and assist the said Rachel in efforts to procure the commencement of proceedings for such divorce or separation, he the defendant, well knowing that no cause or lawful ground existed for either a divorce or separation. And that the said defendant did by the means aforesaid, so far prejudice and poison the mind, &c., of the said Rachel against the said plaintiff; and did so far alienate her affections from the plaintiff, as to persuade and induce her to refuse to recognize or receive the plaintiff as her husband; and that on or about the 15th day of March, 1866, the said Rachel acting under the wrongful and unlawful advice, influence and direction of the said defendant, did refuse to recognize or receive the plaintiff as her husband, or to live with him as his wife; and said Rachel has from thence hitherto acting under the like advice, influence and direction of the said defendant, persisted in such refusal; and by means of the premises the plaintiff has from thence hitherto, wholly lost and been deprived of the comfort, fellowship, society, aid and assistance of the said Rachel, his said wife, &c. Whereupon the plaintiff demands judgment," &c. :

Held on demurrer to the complaint that the facts alleged constituted a cause of action, and a ground for damages.

And the consequences of such alleged acts—the alienation of the affections of the plaintiff's wife, and her refusal to recognize the plaintiff as her husband, &c., constitute a cause of action, although there is no actual absence or separation, physically, by the wife from the plaintiff.

St. Lawrence General Term, October, 1866.

Before BOOKES, JAMES, ROSEKRANS and POTTER, Justices.

THIS is an appeal from an order of a special term, overruling a demurrer of the defendant to the plaintiff's complaint.

J. A. SHOUDY, *for plaintiff.*

C. M. BRIGGS, *for defendant.*

By the court, POTTER, J. The complaint charges that the defendant "contriving, and wickedly and unjustly intending to injure the plaintiff, and to deprive him of the affections, comfort, fellowship, society, aid and assistance of Rachel, his (plaintiff's) wife, did, at, &c., wrongfully and unlawfully purpose, plan and undertake to alienate the affections of his (plaintiff's) said wife; and did then and there for the accomplishment of such purpose" (by various professions and

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pretences set forth), "and by false insinuations against the plaintiff, and by other insidious wiles, so prejudice and poison the mind of the said Rachel against the plaintiff, and so far alienate her affections from her said husband, as to induce the said Rachel to desire, and seek to obtain, a divorce or separation from the said plaintiff; and that the defendant, on or about the first day of February, 1866, did counsel, advise, aid and assist the said Rachel in efforts to procure the commencement of proceedings for such divorce or separation, he, the defendant, well knowing that no cause or lawful ground existed for either a divorce or separation.

And that the said defendant did by the means aforesaid, so far prejudice and poison the mind, &c., of the said Rachel against the said plaintiff, and did so far alienate her affections from the plaintiff as to persuade and induce her to refuse to recognize or receive the plaintiff as her husband; and that on or about the 15th day of March, 1866, the said Rachel acting under the wrongful and unlawful advice, influence and direction of the said defendant, did refuse to recognize or receive the plaintiff as her husband, or to live with him as his wife; and said Rachel has, from thence hitherto, acting under the like advice, influence and direction of the said defendant, persisted in such refusal; and by means of the premises, the plaintiff has from thence hitherto, wholly lost and been deprived of the comfort, fellowship, society, aid and assistance of the said Rachel, his said wife, in his domestic affairs, and also, consequently, of the affection, comfort and society of the plaintiff's infant daughter, which he, the plaintiff, during all that time, ought to have had, and otherwise might and would have had; and the plaintiff has thereby been otherwise much damnified and injured.

Wherefore, the plaintiff demands judgment, &c.

Admitting, as a demurrer does, the facts alleged, do they constitute a cause of action? This seems to be the only question in the case. It is insisted that the acts specifically charged, are not unlawful; and that, therefore, no action can be maintained. The conclusion from the premises of this proposition, is a *non sequitur*, and is not sound. It is not

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the act alone, but it is the consequence which may directly or naturally result from an act, for which the party may be responsible; and most especially is this the case when the act is done mischievously, designedly and wickedly, or with intent to produce the consequences that ensue; and a party is answerable criminally as well as civilly for such consequences.

The questions then in this case are, were the consequences alleged, the direct and natural result of the defendant's acts? and if so, are they the subject of an action, or the ground of damage?

I am not able to see anything unnatural in the result charged, but the contrary. If, as admitted by the demurrer, the defendant contrived, and with a wicked intent, tried to deprive the plaintiff of the society, affections, aid and assistance of his wife, and with such intent did perform the acts alleged; if he did attempt to persuade and induce her to refuse to recognize or receive the plaintiff as her husband; and if she afterwards did so refuse to recognize or receive her said husband, or to live with him as his wife; if the plaintiff subsequently lost, and was deprived of the comfort, fellowship, society, aid and assistance of his wife in his domestic affairs, it is not only legally the direct and natural result of such interference, and necessarily to be deduced from the facts alleged, but it is a fact that stands charged and admitted upon the record, as the consequence of the act of the defendant.

This brings us to the real and only point in the case to be considered. Does such alienation of affection—such refusal to recognize and receive the plaintiff as her husband, and to live with him as his wife—such deprivation of the comfort, fellowship and society of a wife—such loss of her aid and assistance in his domestic affairs, as is charged, when there is no actual physical absence or separation from him, constitute a cause of action, when caused as charged in the complaint?

Separation is the usual consequence of such interference, and the cases found in the books are cases of actual sepa-

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ration from the house and home of the husband. And it is insisted upon the argument, that an allegation of pecuniary loss, or of loss of service by an actual leaving or continuing away from service, is necessary to show a cause of action.

I do not think this argument is sound. "The gist" of the action is the loss of the comfort and society of the wife (*Weedon agt. Timbrell*, 5 Term R. 357, 360). ASHURST, J., said in this case: "The gist of the action is the loss of the comfort and society of the plaintiff's wife; that is always inserted in declarations of this kind, as a material and substantial allegation, and the forms of pleading are evidence of the law." In *Hutchinson agt. Peck* (5 Johns. R. 207-8), SPENCER, J., held, even in the case where a father had given protection to his child, that if he did it maliciously or improperly, against the will of the husband, and thereby deprived him of the comforts he is entitled to enjoy from her aid and society, most undoubtedly an action will lie.

And this proposition of Judge SPENCER is not to be regarded as being at all in conflict with the remark of VAN NESS, J., in the same case, who said: "The true and only inquiry is, has the conduct of the defendant occasioned *damnum cum injuria*, to the plaintiff? If both have been shown, the action is maintainable." If the gist of the action be the loss of the comfort of the society of the wife, then damages with injury, is fully stated and shown.

In *Wensmore agt. Greenback* (Willes' R. 581), it was laid down: "that by '*injuria*,' is meant a tortious act;" and this is fully charged in the present case.

In *Hutchinson agt. Peck* (*supra*), THOMPSON, J., said: "the *quo animo* with which the defendant acted, ought to have been made the material point of inquiry."

In this case before us, the *quo animo* is fully alleged and admitted. In the case of *Wensmore agt. Greenback* (*supra*), which is a leading case, cited with approbation in *Hutchison agt. Peck*, the same objections substantially, were made to the declaration in that case as in this, of omissions of allegations. Ch. J. WILLES said: "To be sure it must be an unlawful procuring, but it is not necessary to set forth all

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the facts to show how it was unlawful." It was insisted that it was necessary to state in the complaint that it was by "false insinuations," but the judge remarked, "that it was not material whether they were true or false; if the insinuations were true, and by means of those, the defendant persuaded the plaintiff's wife to do an unlawful act, it was unlawful in the defendant." And again he says: "Every moment that a wife continues absent from her husband (without justifiable cause), without his consent, is a new tort, and every one who persuades her to do so, does a new injury, and cannot but know it."

Our own courts, to their credit, have quite uniformly adopted the same high moral view of the law and of public policy in this regard, as they have in England. In *Bennett agt. Smith* (21 Barb R. 441), T. R. STRONG, J., held this language: "The wife owes to the husband the duty of living with him, and seeking to promote his interests and happiness; and preventing the performance of that duty, a wrong is done to him involving a pecuniary loss, as well as a loss of peace and comfort in the marriage relation. Whoever is the wrong-doer, he should be subject to an action for damages by the husband." The judge who tried the action last cited, charged the jury "that if the defendant by persuasion or force, prevented the plaintiff's wife from returning to her husband, he was liable; or if he persuaded her to stay away from her husband, such persuasion was an unlawful act, and that the law imputes an unlawful purpose to all persons who do an unlawful act; and that if the defendant had done either of these he was liable, without reference to his motives or intentions."

The general term of the seventh district held this charge to be sound. Such an injury is analogous to, and differs only in degree from an injury to the husband by criminal conversation with the wife. In each case it is alienating the wife's affections from her husband, and destroying the comfort he enjoyed in her society.

So in the case of *Schuneman agt. Palmer* (4 Barb. 227), HARRIS, J., laid down the rule: "The husband has the right

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to the society and assistance of his wife, and whoever persuades or entices her to separate herself from him, and thus deprives him of that right, is liable to an action." And again: "Whenever a wife is unjustifiable in abandoning her husband, he who knowingly and intentionally assists her in thus violating her duty is guilty of a wrong, for which an action will lie." This principle was repeated in *Barnes* agt. *Allen* (30 Barb. 663).

The case before us differs from the cases cited not in principle, but only in the fact that there was no actual departure of the wife from the husband's house. But how does this fact change the case, or the principle to be determined by it? The injury in either case is the same. I am not sure that it is not aggravated by her remaining. Here was the same poisoning of the mind, the same alienation of her affections, the same refusal to receive him as her husband, and to live with him as such; the same refusal of her comfort, fellowship, society and of her aid and assistance in his domestic affairs; all that constitutes the gist of the action, all equally induced by the unlawful act of advice of the defendant. Her actual presence with him under such circumstances, maintaining towards him such feelings, could afford him no relief, but would rather add the provocation of insult to the keenness of the injury inflicted; it would continue a present, living, irritating, aggravating, if not consuming source of grief, which her absence might in a measure relieve. At all events, it would relieve him from the burthen of her support. It is laid down by *Bishop* in his work on *Marriage and Divorce* (§§ 797, 781, 782, 799), that the refusal of a husband or wife to dwell with the other party to the marriage as husband or wife, is *desertion*; and the same authorities hold that there may be a desertion though the parties continue to occupy the same house. (1 *Bishop*, § 779; 2 *Litt. [Ky.] R.* 337; *Moss* agt. *Moss*, 2 *Indell's [N. C. R.]* 35.)

How is desertion then to be distinguished from separation? What reason is there that requires a technical physical separation to constitute a cause of action? I apprehend that the separation which occasions the injury, the suffering, the

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loss, is based upon a higher principle than this ; it strikes at the highest enjoyment of life ; it is alienated affections ; it is the loss of comfort, fellowship and society ; it is the loss of aid and assistance in domestic affairs ; the loss of conjugal rights. It may, says *Bishop*, be laid down as a rule, that if one party refuse to the other whatever belongs in marriage alone, from causes resting in the will, and not from physical inability, the refusing party would thereby voluntarily withdraw from whatever the relation of marriage distinguished from any other relation existing between human beings, is understood to imply. Therefore, he should be holden to desert thereby the other (§ 782). Let the law be administered in all its fidelity and integrity, but let it not be made the subject of this reproach, that he who admits the infliction of the injury complained of in this case, may escape its penalties upon a mere frivolous and immaterial technicality.

I think the order of the special term was right, and should be affirmed.

SUPREME COURT.

THE PEOPLE *ex rel.* RICHARD M. HENBY agt. CHARLES G. CORNELL.

A corporator of a municipal corporation has a right to have a general inspection and take copies of the public documents and records of the corporation, under such rules and restrictions as will preserve the safety of the records and prevent any serious interruption of the duties of the custos.

New York Special Term, November, 1866.

THE relator, Richard M. Henry, obtained from Mr. Justice GEORGE G. BARNARD, an alternative mandamus to Charles G. Cornell, street commissioner of the city of New York, commanding the latter to permit the relator to see and inspect certain contracts and vouchers on file in the street department of said city, or show cause to the contrary thereof. The relator's affidavit showed that he was a citizen of said city, and a member of the corporation, "The mayor,

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aldermen and commonalty of the city of New York ;" that Cornell was an officer of said corporation, being the head of the street department, a department of the government of said corporation ; that said Cornell, as such street commissioner, had in his custody certain contracts for various public works done under his direction, and certain vouchers for payment of the public moneys of said corporation made for such works ; that the relator had the right, as a member of said corporation, to see and inspect all such contracts and vouchers, and that it was the duty of said Cornell to exhibit them to any member of the corporation ; that the relator had applied to said Cornell in August, 1866, for permission to see such documents, which was refused by said Cornell.

The street commissioner replied by a return, stating that he was, and always had been, willing to show such documents, but that the relator had demanded them as the attorney of the citizens' association, and claimed the right to take them ; that he denied the *right* of the relator to see them ; that such documents were in danger of destruction or mutilation, if they must be exhibited to any and every person ; that to afford all the members of the corporation the right to inspect the files and records of his office would require additional offices and an additional staff of clerks beyond those allowed by law ; that the relator must show some private personal interest in such documents before he should see them.

The motion for a peremptory mandamus was argued before Mr. Justice GEO. G. BARNARD, at special term.

JOSEPH F. DALY, *for relator, and the citizens' association.*

I. The relator claims the right as a member of this corporation, to see and inspect the papers on file in the street department.

II. The relator as a citizen, has a common interest with other members of the corporation, in the matters of which

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the street department has control, and the papers relating to such matters.

III. The right of the relator as a citizen, to inspect those papers, rests upon the same basis as every right under our free institutions.

The *res publica* from which our republican government takes its name, includes every part and item of the common wealth or common property, and it is a novel doctrine for the street commissioner to maintain that the papers and records relative to the common property belong to the street commissioner exclusively, or that his right to them extends further than their keeping in proper shape for exhibition at all times.

These papers which we call for, relate to the public streets, roads and works of this city. We claim an equal right in all ; to use the public streets and to inspect the records concerning them. The street commissioner's duties are alike to both ; to keep them ready for such use.

The street commissioner, as the agent of the corporation and its members, uses their money to preserve their property, and files his vouchers and evidences of the proper expenditure of such money.

Why are these evidences preserved, if not to be shown when demanded ?

What *greater* or more personal interest can the relator show than that he is a member of the corporation, and that he desires to see the proofs of the proper expenditures of the common money by the common agent ?

IV. In England, the right of a member of a corporation to inspect the documents of the corporation, and to have a mandamus compelling the custodian thereof to show them, is well settled (*Willcock on Mun. Cor.* 349, and cases cited). Also, the right of a subject to inspect documents of public proceedings lodged in the custody of public officers. (1 *Wiss.* 297 ; *Id.* 240 ; 1 *Black's Rep.* 39 ; *Rex & King*, 2 *T. R.* 234 and 304.) Also the right of a manorial tenant to have a mandamus compelling the lord to exhibit the court rolls

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and books. (3 *T. R.* 141 ; 10 *Earl*, 235, and other cases cited above.)

V. These cases in the English books claim that the relator must show a private right. But if the right be thus far conceded under a monarchical government, surely under our republican government one step further may be taken, and the relator permitted to show as his right the right which underlies our whole fabric of government.

In England public officers are the masters of the people, and the agents of the sovereign. In America they are servants of the sovereign people. The right of the relator is superior to any which an English subject could ever claim.

If this fact is not clearly appreciated by the street commissioner, it is time that the court solemnly declared it.

VI. In respect to the books, records and accounts of the county of New York, the statute has declared such a right in the people, without condition or exception (1 *Rev. Stat.* chap. 12, tit. 2, art. 1).

In respect to public documents of the city of New York up to the year 1699, the statutes of the state have expressly declared this right without condition or exception (*Laws of 1865*, chap. 171).

There is no reason for making a distinction between the public papers of to-day and those of a century past ; or between those of the city and those of the county. And if the legislature has omitted to declare our right in the former, it is simply a defect of police, which the court will remedy by its writ of mandamus, because "in justice and good government it ought to be done" (6 *Bac. Abr.* tit. *Mand.* 418).

At all events the intent of our law makers is plain, and the court is bound to carry that intent into force.

VII. The street commissioner offers but two reasons for refusing an inspection of the papers, viz : That it "would involve a serious disturbance of the necessary details of his office, and impede the proper working thereof." That it would require a larger office and a "larger staff than he now employs, to secure said records and protect them from loss, injury or mutilation."

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We answer to the first, that if we have the right, the showing of such papers is a part of the necessary details and business of his office.

And to the second: 1. That the Revised Statutes of this state making it forgery, and punishable as such, to tamper with these records, sufficiently protects the public property, as other penal statutes protect private property (4 *R. S. chap. 1, tit. 3, art. 3, §§ 26 and 69*). And that: 2. The danger of mutilation of records is only to be apprehended from persons having *private interests* in them, and not from a party having the public good in view, as the relator, Mr. Henry, has.

The counsel of the street commissioner, who speaks of the destruction and robbery of public papers which has heretofore occurred, will no doubt readily admit that the criminal must have been personally and pecuniarily interested in the missing documents.

It is least dangerous to entrust them to the investigation of idle curiosity, and even to a person who seeks them with motives inimical to the official who has possession of them, for in the latter case the searcher will be only too solicitous to carefully preserve evidences of delinquency, and the only danger consists in leaving them in the undisturbed possession of the official himself.

The danger apprehended by the street commissioner is too remote to influence the court.

JOHN K. HACKETT *and*

RICHARD O'GORMAN, *for street commissioner.*

I. The cases cited on behalf of the relator, from the English reports, sustain the only true and reasonable position in relation to the claim of a private citizen to examine the books, vouchers, &c., of a public office. The citizen must have some private interest, connected or depending upon the proceeding of the official, and which is affected by the documents which he specially desires to examine. This is justice and the law. The relator seeks to go further, and

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claims that because the government of the United States is republican and that of England monarchical, a distinction in this matter exists between the respective rights and duties of citizens and public officials in the two countries. No such distinction exists. The official in both cases is the servant of the people. In both cases his rights and his duties are measured by the requirements of the public weal. What the public good requires him to do within the sphere of his office, he is bound to do, and no more.

Now the public good does not require a public official to offer the original public documents in his possession to any and all citizens who have no personal interest in the subject of these documents, and are merely actuated by motives of idle curiosity, or of enmity towards the official, whose official records they desire to inspect.

The court will perceive that the argument of the relator claims the right of inspection for such a class.

To afford facilities to such persons would not be for the public good, but would, on the contrary, manifestly impede, disturb and prevent the public service.

The confusion and ill feeling, which would be sure to result from such a practice, must suggest themselves to the court.

Neither is it reasonable that any individual citizen having no private interest or concern in the matter, should claim, as against a public official, to represent the public.

The public official is himself the legal representative of the public, charged specially with the protection of the public interests; and in default of any proof or allegation to the contrary, must be presumed faithfully to discharge his duty.

It is a part of his duty to give to any private citizen full information as to any public transaction in which his personal and private interests are concerned. But it is not his duty to accept every individual citizen who may apply to him, no matter how respectable, as the self-elected representative of the public, and to confide to him all the information, documents, vouchers, &c., which have been placed in the charge of such official, in trust for the whole public.

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It will be seen that the distinction in the English cases, is the key to the solution of this class of questions.

Every citizen has a right to get from every public official all reasonable information as to any public matter affecting his own private interest, of which information the official is the proper depository.

The claim that each citizen can, when he pleases, go into a public official's office, claim to represent the whole public, and demand the right to see and copy then and there all the public documents, is simply absurd.

BARNARD, J. The question presented in this matter is this: Has a corporator of a municipal corporation a right to have a general inspection, and take copies of the public documents and records of the corporation of which he is a member, under such rules and restrictions as will preserve the safety of the records, and prevent any serious interruption of the duties of the *custos*?

Upon the argument, I was strongly of opinion that such corporator had such right, and subsequent reflection and investigation has confirmed that opinion.

It was claimed and strongly urged on the argument, that such corporator had a right to inspect such records only when he had some private interest, for the enforcement and protection of which, the inspection of certain documents is necessary, and that even then the inspection must be limited to those documents; and it was claimed that this rule was established by the English decisions.

I have examined the English authorities referred to on the argument, and also such as I have been able to discover in the books, and think that none of them so restrict the right of inspection, while many of them distinctly uphold the right of a general inspection.

In *Rogers agt. Jones* (5 D. & R. p. 484), it did not appear on the moving papers, that any question was involved in the cause which could justify an inspection of the court rolls, yet the mandamus applied for was ordered to issue.

In *King agt. Shelley* (3 T. R. 142), the respondent offered

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to show everything connected with the demandant's title, but the demandant claimed the right to general inspection, and mandamus went accordingly.

In *Herbert agt. Ashburn* (1 *Wils.* p. 297), a rule was made requiring the plaintiff to show cause why the defendant should not have liberty to inspect the books of the sessions of the corporation of Kendale, it was objected that the party is not entitled to see the books unless he can show to the court by affidavit, that they contain matters relating to the thing in question, which is, whether the park lands be within the town or corporation of Kendale? *Sed per curiam*: "These are public books which everybody has a right to see," and the rule was made absolute, without hearing the other side.

Upon the facts appearing before the court in the above three cases, the decisions made therein could only be made upon the ground that a corporator, from the mere fact of being a corporator, had a right to a general inspection of the books and records of the municipal corporation of which he was a member; consequently the court must be regarded as having in making these decisions, decided in favor of such right.

Thus we see an eminent writer on the subject of municipal corporations (*Glover on Municipal Corporations*, p. 262), lays down the following text as being derived from the decisions: "Every corporator has a right to inspect all the records, books and other documents of the corporation upon all proper occasions, and if upon application, the officer who has the custody refuse to show them, the court will grant a mandamus to enforce his right."

There are some cases which at first blush would appear to be authorities against the right of general inspection, but on close examination they do not turn out to be so.

Thus in *King agt. Babb* (3 *T. R.* 580), the court while deciding that upon a rule of inspection made in a suit, the party is restricted to an inspection of such documents as have a bearing on the subject matter of the litigation, yet do not undertake to decide that any such rule of restriction

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obtains when a corporator sues out a writ of mandamus founded solely on his right to inspect as being a corporator.

In *King agt. Allgood* (7 T. R. p. 746), it was held that a rule for inspection could not be made unless a suit was pending. This doctrine, however, was distinctly overruled in *King agt. Lucas* (10 East, 235). In *King agt. Lucas*, it was held that the demandant had a private interest to subserve in the inspection called for. This was undoubtedly good ground for making the order. But the bare placing by a court of its decision on one good ground, neither expressly nor impliedly decides that there are not other equally good grounds. The court in *King agt. Lucas*, does not undertake either to overrule the first three cases I have referred to, nor to deny the right of a corporator to a general inspection. A good ground applicable to that particular case existed for granting the order, and the court chose to, and did, put its decision on that ground.

The English authority seems to me to be in favor of, and not against the right of a corporator to a general inspection.

I see no principle upon which it can be held that a corporator of a municipal corporation has not a right to a general inspection of the public records.

It is true that the whole body of the corporators acting through their legally constituted representatives, as well perhaps as the legislature under which the corporation holds its charter, may make laws and ordinances restricting the right of general inspection, but unless there is some such restriction, I am unable to see any principle upon which it can be held that a corporator has not a right to a general inspection of "public records of the corporation." In the language of the court in *Herbert agt. Ashburn*, "these are public books which everybody has a right to see."

I have been referred to no express enactment either by the corporation or the legislature, restricting the right of inspection, nor have I been furnished with any argument showing that any such restriction is necessarily implied from the framework of the charter of the corporation, and the acts of the legislature in reference thereto. If the learned

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counsel cannot find any such express enactment, nor furnish any such argument, it would be fair to assume that no such enactment exists, and that no such argument can be furnished.

I have been unable myself to find any such positive enactment, and am unable to see any implied restriction in the framework of the charter, or in the various legislative acts relative thereto. The citizens within the corporate limits constitute the corporation, while the mayor, aldermen, common council, street commissioner and others, are its officers or agents, to whom are confided under certain restrictions, the care and managements of the property, business and interests of the corporation. If from the bare facts that corporations can only act through officers or agents, and that, therefore, officers are appointed to whom the care of the property, business and interests of the corporation are entrusted, and who are subject to removal before the time for which they are appointed has expired, and who are also subject on the expiration of their terms to be replaced by others, at the will of the corporators, it results that immediately on the appointment of such officers the corporators have no longer any interest in the manner in which their property, business and interest is cared for, conducted and looked after by their agents, then it also follows that the corporators would have no right to inspect the books and papers in the custody of the officers relating to their official business. If, however, the corporators, notwithstanding the appointment of such officers, still retain an interest in the manner in which their property, business and interests is cared for, conducted and looked after, then it follows that they have a right to as full knowledge of all the official acts of their officers as the officers themselves have, so as to enable them to ascertain whether their officers have performed their duty in such manner as is acceptable to them, with a view to determine whether they will continue them in office or not.

It cannot be seriously questioned but that the corporators, notwithstanding the appointment of officers to conduct the business of the corporation, still retain a very great interest

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in the mode and manner in which it may be conducted, and consequently upon the above reasoning, have a right to full knowledge of all the official acts of their officers, and of course a right to all the means of knowledge which their officers possess in their official capacity.

I have come, therefore, to the conclusion that both on authority and principle, the relator is entitled to the inspection he asks, and also to make such copies of public documents as he desires.

There is one argument against granting the writ remaining to be noticed.

That argument is, that it would be very inconvenient to allow every citizen that chooses so to do, to come into the office and inspect documents, and make copies of them ; and it is suggested that if they be allowed so to do, larger accommodations, and a larger clerical force would be required. I do not understand that there is any serious difficulty in procuring larger accommodations and more clerical force, if that should be found necessary. But this is a mere anticipated difficulty, which I apprehend will not practically occur. If it should occur, I see no difficulty in providing means to remove it.

Of course the street commissioner has the right and power to prescribe reasonable general rules as to the hours during which citizens may inspect the records of his office, and also such reasonable general rules as shall be necessary to preserve the records from loss or mutilation.

Mandamus must issue.

Grocers' National Bank agt. Clark.

SUPREME COURT.

THE GROCERS' NATIONAL BANK of the city of New York agt.
GEORGE A. CLARK.

An action to recover damages for the fraudulent misapplication or conversion of property by an officer or agent of a banking association, is assignable; and the officer or agent may be arrested and held to bail at the suit of the assignee. The attribute of assignability is not confined to rights of action belonging to natural persons; it extends with equal effect to those belonging to artificial persons.

New York General Term, January, 1866.

Before INGRAHAM, CLERKE and BARNARD, Justices.

THIS action is brought, as appears by the affidavit, to obtain the arrest. (and the order of arrest), on a claim for "property embezzled or fraudulently misapplied," "by an officer of a banking association," pursuant to subdivision 2, of section 179, of the Code.

GEORGE W. PARSONS, *for defendant.*

First. If this arrest can be sustained, it must be on purely technical grounds. There are no equitable or just considerations to sustain it.

What are the facts? A young officer in a bank, acting in pursuance with the general confidential dealings between the senior officers and a customer of high standing, trusts the dealer in an irregular way. It appears that in some instances the cashier and others in the bank knew of the transactions, and assented to them.

Grant that this does not lessen the offense against the stockholders, it destroys any theory of criminal intent on the part of defendant.

Again, admit for the argument, that the offense was willful and corrupt, the parties in interest, responsible for the affairs of the bank, have allowed the claim to grow stale. It is over eight years old. They obtain an indictment for an alleged high crime, and hold this young man under its

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ban for seven or eight years, until even the officers of justice, as well as the officers of the bank say, enough, the punishment has equalled the offense; they condone it; they invite the offender to resume his family associations and avocations, and assure him he will be no further molested. The stockholders interested in the loss sustained by the bank, cease to exist.

If a man be inveigled into an exposure to arrest, the court will intervene and discharge. Are there not equitable reasons in this case which make it more obligatory upon the court to dismiss this prosecution?

Second. The bank allowed the claim against the principal debtor to be barred by the statute of limitations; they did more; they discharged that debtor; they cancelled his obligations, viz: the certified checks. Can they now hold the defendant, who did not profit by the transaction, and was a mere surety?

Third. It cannot be contended that the Grocers' National Bank, plaintiffs herein, are in any sense the same institution as the original Grocers' Bank.

1. The original bank became extinct when it went into the hands of a receiver.

2. When it was revived, or the charter was restored, it was another institution of the same name. It was re-created with different capital, and a new set of stockholders.

3. But it disposes of this point to say that the Grocers' Bank was a state institution; a creature of state law; while the Grocers' National Bank is a corporation created under a law of congress.

a. It does not help to answer this to say that the transformation is made by the consent of the state, for it merely permits the state institution to cease to exist, and it is by the law of congress that the bank obtains its first existence.

b. Either the Grocers' Bank own this claim, and can sue by virtue of the power contained in the enabling act of 1865, or it has been transferred to the plaintiffs.

Fourth. This transfer being assumed, we say that this

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action is based upon a tort (*Union Bank agt. Mott*, 27 N. Y. R. 633).

This action could not be sustained but for the allegation of a crime. It is not claimed that the offense was committed against the plaintiffs' bank, but against the original Grocers' Bank.

Fifth. Then plaintiffs can claim a standing in the case only as assignees of the demand.

1. But it has been held that such torts could not be assigned. (*Lamphere agt. Hall*, 26 How. 509; *Hyslop agt. Randall*, 4 Duer, 660; *Zabriskie agt. Smith*, 3 Kern. 322; *McMahon agt. Allen*, 12 Abb. 275, General Term, First District; *Borst agt. Baldwin*, 30 Barb. 180; *Hall agt. Robinson*, 2 Comst. 293; *Gardner agt. Adams*, 12 Wend. 297.)

2. In any case which seems to hold a contrary doctrine, it has been upon the ground of relation of the trespass or tort to property, so that the tort could not be separated from the injury to property. (*McKee agt. Judd*, 2 Kern. 622; *Gillett agt. Fairchild*, 4 Den. 80; *North agt. Turner*, 9 Serg. & Rawle, 244.)

3. Here the very essence as well as substance of the action is the alleged tort.

4. The action is to recover for money alleged to have been embezzled or fraudulently misapplied, or for alleged misconduct in office, under subdivision 2, of section 179.

Sixth. If it be urged that it is competent to waive the tort and sue on an implied promise or contract, the answer is,—

1. If the tort be waived, then the right to arrest must be abandoned; but

2. It does not appear that either bank ever did waive the tort. The action appears to be brought for the tort.

3. In either view the arrest must fail.

Seventh. It is plain that this claim is barred by the statute of limitations.

1. The defendant as matter of law, never lost his residence in this state until he removed to Arkansas, where he resided but two years. The statute says: "If after such cause of

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action shall have accrued, such person shall depart from, and *reside* out of this state, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action" (*Code*, § 100).

2. This statute is construed as we insist it should be, in *Cole* agt. *Jessup* (10 N. Y. 103). Defendant's return was public, and he could have been sued. It is not necessary to show that plaintiffs knew of it. (*See last case.*)

WILLIAM A. COURSEN, *for plaintiff.*

By the court, CLERKE, J. The only question, among those presented on this motion, of which I entertained any doubt on the argument, is that relating to the assignability of the demand.

This is nothing more or less than an action to recover damages for the fraudulent misapplication or conversion of property by an officer or agent of a banking association. If the property of an individual was thus misapplied or converted, there would be no doubt that the right to recover damages against the wrong-doer would survive to his executors or administrators (3 R. S. 746, § 1, 5th ed.); it would be *assets* in their hands. If he had assigned it, the claim would be recoverable by his assignee. In other words, it is assignable. Why then should not the same kind of wrong be equally assignable, and be equally deemed *assets*, when committed against a banking association? The attribute of assignability is not confined to rights of action belonging to natural persons; it extends with equal effect to those belonging to artificial persons.

The right of action, then, in this case, passed as *assets* to the plaintiffs, from the Grocers' Bank to the Grocers' National Bank, by operation of the act of 1865 (*Laws of 1865*, p. 171, § 6).

The order should be affirmed, but I think the ends of justice will be sufficiently answered by holding defendant to bail in \$20,000, &c.

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NEW YORK SUPERIOR COURT

ANGUS ROSS agt. THE MAYOR, &C., OF NEW YORK.

The court has no power to order a *compulsory reference* of an action brought to recover damages not arising out of contract, even though the items of damage which are to be examined be ever so numerous.

An action brought against the corporation of the city of New York, under the act of 1855, which renders the corporation liable for damages, for destruction of or injury to property, by a mob, cannot be *compulsorily referred*, although in ascertaining the plaintiff's damages, a long and probably tedious examination of the extent of the injury and value of the property must be had.

Special Term, November, 1866.

MOTION for a reference.

G. W. PARSONS, *for the motion.*

RICHARD O'GORMAN, *counsel to the corporation, opposed.*

MONELL, J. This is an action to recover damages for the destruction of property by rioters, in July, 1863. The trial of the action will require the examination of a large number of items of property injured or destroyed, the value of which constitute the damages the plaintiff seeks to recover; and it is claimed that such large number of items constitutes an *account*, and renders the action, therefore, a referable one.

The language of the Code and of the Revised Statutes, in respect to the referability of actions, is the same; and a compulsory reference can be ordered only where the trial will require the examination of a long account; and according to all the cases, "account" must be taken in the ordinary acceptance of the word.

Under the Revised Statutes it was uniformly decided that actions for *torts* were not referable. (*Silmser agt. Redfield*, 19 Wend. 21; *Dederick's Admin. agt. Richley*, Id. 108.) And even in *covenant* a reference was not allowed where mere items of damage were to be examined (*Thomas agt. Reab*, 6 Wend. 503).

Under the Code the decisions are as uniform, and I have

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not been able to find any case holding that actions for *torts* can be compulsorily ordered to a reference.

I was referred on the argument to several cases which it was supposed favored the reference of actions like the one in question. But I do not find, upon examining those cases, that they in any degree sustain the plaintiff's motion. In *Keeler agt. Poughkeepsie, &c. Plank Road Co.* (10 How. Pr. R. 11), the action was upon a *contract* for constructing a plank road, and there being a long account, the action was clearly referable. *Mills agt. Thursby* (11 How. Pr. R. 113), and *Jackson agt. DeForrest* (14 Id. 81), were cases of partnership accounting, and expressly within the letter of the statute. *Atocha agt. Garcia* (15 Abb. Pr. R. 303), was also on contract.

I was also referred to some cases on insurance policies, which were held to be referable. Without stopping to distinguish between such actions, and such as seek to recover *damages* for injury to or destruction of property, it is enough that the power to refer insurance cases is much doubted (*McLean agt. East River Ins. Co.* 8 Bosw. 700), and has been allowed only when no issue besides the ascertainment of the value of the property injured or destroyed, remained to be tried (*Samble agt. Mechanics' Ins. Co.* 1 Hall, 56). Whereas, it has frequently been decided since the Code, that actions for wrongs, or not arising on contract, cannot be compulsorily referred. In *Sharp agt. The Mayor, &c., of N. Y.* (9 Abb. 426), the action was by a lessee of a ferry to recover damages for alleged failure of defendants' title. Judge CLERKE says: "Compulsory references should be rigorously confined to cases invoking the examination of a *bona fide* account in an action of contract." *McMaster agt. Booth* was to recover damages for injury to property, caused by the defendant's negligence. The property consisted of a large number of planes, and a great number of tools. A reference was refused. *Dewey agt. Field* (13 How. Pr. R. 437), was against a sheriff for a false return to an execution. It is there said, "the examination of numerous items of damage, does not constitute an account between the

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parties, within the meaning of that term." And *McCullough* agt. *Brodie* (*Id.* 346), was an action for damages for false representations, and it was said, "when the items to be investigated are made the subject of examination, in order to recover *damages* strictly and properly so called, either party has a right to have the issues tried by a jury."

It will be seen, therefore, that the current of decision is in opposition to the power of the court to make compulsory reference of actions brought to recover damages not arising out of contract, even although the items of damage which are to be examined be ever so numerous.

This action is brought under the act of 1855, which renders the corporation liable for damages, for destruction of or injury to property, by a mob. And, although, in ascertaining the plaintiff's damages, a long and probably tedious examination of the extent of the injury and value of the property must be had, yet the case does not fall among such as the court has the power, without the consent of parties, to order to a reference. I regret that it is so. Not only might much time of courts and juries, now occupied in the mere assessment of the value of property in this class of cases, be more advantageously employed, but results more accurate and satisfactory could be obtained, by the time and care which referees would bestow in investigating such claims. But the legislature has confined the power to a class only, and we cannot enlarge the statute to cover or include other cases.

The motion must be denied.



People agt. The Board of Education of N. Y.

SUPREME COURT.

THE PEOPLE *ex rel.* EDWARD M. BANKS and others, appellants
agt. THE BOARD OF EDUCATION of the city and county of
New York, respondents.

By the provisions of the act of 1864, principals (teachers) and vice principals (teachers) for the *common schools* in the several wards in the city of New York, shall be *appointed* by the *Board of Education*, upon the written nomination of a majority of the trustees of the ward.

The actual appointment being thus vested in the Board of Education, it necessarily follows that the *power of removal* of teachers is also vested exclusively in said board. Consequently the Board of Education have the power of deciding when a *vacancy* in the office of a teacher has occurred.

Therefore, the *tender of resignation* by a principal or vice principal, should be directed and delivered to the *Board of Education*, and not to the *trustees of common schools of the ward* where such principal or vice principal is acting.

New York General Term, November, 1866.

Before INGRAHAM CLERKE *and* BARNARD, *Justices.*

APPEAL from order made by Mr. Justice BARNARD, denying motion for mandamus.

The relators, citizens of this state and residents of the twenty-first ward of the city, and trustees of common schools in that ward, on an order to show cause, applied for a mandamus to compel the defendants, the Board of Education, to appoint Abner B. Holley principal teacher of the male department of ward school No. 49, situated in said ward.

The motion was denied on the moving papers, no papers being read or used in opposition.

The facts upon which the application was based, aside from their bearing upon the position and office of the relators, and the organization of the school department and the schools under its charge, were simply these :

1st. Prior to, and on January 19th, 1866, one William H. Wood was the principal teacher of the male department of ward school No. 49, duly appointed and acting.

2d. On that day, in a communication to the board of trustees of that ward, he resigned the position. The resignation to take effect May 1st, 1866.

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3d. On the 19th day of February, 1866, the resignation was finally accepted by the board of trustees.

4th. On the 5th of March, 1866, at a meeting of the said board of trustees, all the members being present, Abner B. Holley was duly nominated for the position, to supply the place of Wood, as such principal teacher.

5th. The said trustees did thereupon, in proper form in writing, nominate Holley to the Board of Education for appointment to the place made vacant by the resignation, and said nomination in all things conforming to the statute, was on the 7th day of March, laid before the Board of Education.

6th. On the 2d day of May, 1866, the Board of Education took up and considered the said nomination, and refused to act, upon the ground that Wood had not resigned, and that there was, therefore, no vacancy.

7th. Holley was in all respects qualified for the appointment, and held the necessary certificates of qualification, and the relators are advised and believe that there was and is a vacancy in the position of principal teacher in the male department of said school, which should be filled by the appointment of their nominee.

H. W. JOHNSON *and*

W. F. ALLEN, *counsel for appellants.*

I. The relators as trustees, are by law charged with the conduct and management of the schools within the ward, and have a duty to perform in the selection and appointment of teachers, and in their capacity as trustees, may resort to a writ of mandamus, when that is a proper remedy, to compel action by others in matters affecting the schools under their charge.

As citizens interested in the performance of a duty imposed upon the Board of Education for the benefit of the public, they are proper actors and relators in this proceeding. (*Laws of 1864, p. 825, § 12 ; Id. p. 828, § 23 ; Laws of 1851, p. 740, § 10 ; Manual of Board of Education, pp. 6, 7, 24, 40 ;*

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People agt. Collins, 19 *W. R.* 56; *Same agt. Tracy*, 1 *How. Pr. R.* 186; *Crary's N. Y. Practice*, 284; *Tapping on Mandamus*, 288-90.)

II. The Board of Education is a body corporate, and as such performs the duties devolved upon it, and the proceedings were, therefore, properly taken against it by its corporate name, as proceeding against the individual members of the board would have been irregular. (*Laws of 1851*, p. 735, § 2; *Id.* p. 736, § 8; *Manual of Board of Education*, 9, 14; *Tapping on Mandamus*, 815; *People agt. Supervisors of Livingston*.)

II. The duty of appointing teachers devolved upon the Board of Education, and concerns the public, and is ministerial in its character, and performance may be compelled by mandamus; and in case of neglect there is no other adequate remedy. (*Ex parte Goodell*, 14 *J. R.* 325; *Hull agt. Supervisors of Oneida Co.* 19 *Id.* 259; *People agt. Collins*, 19 *W. R.* 56; *Ex parte Heath*, 3 *Hill*, 42; *Achley's Case*, 4 *Abb.* 35; *People agt. Tremain*, 17 *How. Pr. R.* 10.)

IV. The fact is undisputed that Wood, the former principal had resigned, and that there was a vacancy to be filled.

There is no pretense that the employment of Wood was for a specific time, and that he could not vacate the position and leave the school at the time indicated in his letter of resignation, and there is no statement or suggestion that his resignation was not effectual and operative.

It was addressed to the proper board—that having charge of the school, and whose duty it was to select and nominate a person to fill the vacancy.

But whether this is so or not, the vacancy was caused by the actual surrender of the employment, without a formal resignation to any board or body of men.

The resignation and surrender of the appointment and employment was absolute at the time of sending to the trustees, and took effect at the time indicated for that purpose. (*Gilbert agt. Luce*, 11 *Barb.* 10; *U. S. agt. Wright*, 1 *McLean*, 509; *People agt. Porter*, 6 *Cal.* 26; *Gates agt. Delaware*, 12 *Iowa*, 405.)

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V. The decision or statement by the Board of Education, that Wood had not resigned his position, is not evidence upon that subject. The fact of resignation is a matter *in pais*, to be proved or disproved by competent evidence. It is alleged by the relators on oath, and is not controverted.

VI. It was the duty of the Board of Education to appoint Holley, the nominee of the relators. The right and duty of nomination is by law vested in the trustees. They are bound by law to make nominations for principal teachers of the ward schools, whenever a vacancy occurs, and the Board of Education are required to appoint on their nomination, and can appoint no other (*Laws of 1864, p. 825, § 12*).

The Board of Education act ministerially and not judicially in the premises. They have no discretion. It is quite likely that the court would not compel the board to act upon an unworthy nomination, but that cause for not proceeding must be shown.

Here the nominee is shown to be abundantly qualified, and in all respects a proper person to receive the appointment, and nothing is suggested adverse to this statement. It is not competent for the Board of Education arbitrarily to refuse to appoint the nominee of the trustees, and if they do so, they may be compelled to make the appointment. (*Newburgh Turnpike Co. agt. Miller, 5 Johns. Ch. 13; The People agt. Supervisors of New York, 11 Abb. 121; 1 Kent's Com. 467; Morris agt. People, 3 Denio, 381; Rex agt. Archbishop of Canterbury, 15 East, 117; Ex parte Jennings, 6 Cow. 510; People agt. Judges of Superior Court, 5 W. R. 114; People agt. Judges of Dutchess Co. 20 W. R. 658.*)

VII. The Board of Education was bound to act upon the nomination, and the writ should have gone upon the case made by the relators to put that body in motion (*Cases cited above*).

A. R. LAWRENCE, JR., *counsel for the Board of Education, respondents.*

I. The relators have no standing in court.

If Mr. Holley has been unjustly refused the possession of

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an office to which he is legally entitled, *he* is the proper party to apply to the court for relief.

II. The law gives to Mr. Holley, if legally entitled to the position mentioned in the affidavit of the relator Banks, a remedy by a proceeding to obtain possession of the books and papers attached to such position (*People agt. Allen*, 42 Barb. 203).

He may also maintain an action against the respondents for the compensation attached to the office in question (*Gildersleeve agt. Board of Education*, 17 Abb. 201).

If not an officer, this is not a matter of public right, and relators cannot have a mandamus.

III. The affidavit of the relator shows that the respondents have acted upon the alleged nomination of Holley, and have, after investigation, pronounced a judgment on the subject. If their judgment is erroneous it can only be reviewed by certiorari. (*Laws of 1864*, p. 825, § 12; *Le Roy agt. Mayor, &c. N. Y.* 20 Johns. 430; *Ex parte Mayor of Albany*, 23 Wend. 277; *Betts agt. City of Williamsburgh*, 15 Barb. 255.)

IV. The points above taken show that both Holley and the trustees of the twenty-first ward have ample remedies if aggrieved, and that a mandamus is unnecessary to afford either of them redress.

Upon familiar principles, therefore, the writ of mandamus should not be granted. (*Ex parte Firemen's Ins. Co.* 6 Hill, 243; *Matter of Shipley*, 10 Johns. 484; *People agt. Supervisors of Chenango*, 1 Kern. 563; *People agt. Thompson*, 25 Barb. 73.)

V. The court is asked to compel the respondents to appoint a certain person to the office in question, when the law vests the appointing power in the respondents. In other words, it is asked to control the discretion of the respondents in regard to the principalship of the school in question. Courts never interfere by mandamus to control a discretion vested in inferior tribunals or municipal bodies. Besides, the relator asks too much. (*People agt. Board of Supervisors*, 10 Abb. 233; *Ex parte Nelson*, 1 Cowen, 417; *People agt. Brook-*

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lyn, 1 *Wend.* 318; *Ex parte Brown*, 5 *Cow.* 31; *Hutchinson agt. Com. of Canal Fund*, 25 *Wend.* 692; *People agt. Supervisors of N. Y.* 1 *Hill*, 362.)

The papers presented by the appellant also show that in this case the respondents have exercised their discretion, and have rendered their judgment upon the point in dispute, to wit. the question of vacancy.

VI. There was no vacancy existing in the principalship of ward school No. 49, at the time the trustees sent the nomination of Mr. Holley to the respondents, or at the time that such nomination was made.

(a) The twelfth section of the act of April 25th, 1864, entitled "An act in relation to common schools in the city of New York," provides as follows :

"SEC. 12. The schools in the several wards shall be classified as grammar, primary and evening schools, and teachers for the said schools shall be appointed as follows : principals and vice principals by the Board of Education, upon the written nomination of a majority of the trustees of the ward, stating that the nomination was agreed to at a meeting of the board of trustees, at which a majority of the whole number in office were present. Other teachers, and also janitors, shall be appointed by a majority of the trustees for the ward, at a meeting of the board of trustees. Any teacher may be removed by the Board of Education, upon the recommendation of the city superintendent, or of a majority of the trustees for the ward, or of a majority of the inspectors for the district. The board of trustees for the ward, by the vote of a majority of the whole number of trustees in office, may also remove teachers employed therein, other than principals and vice principals, and may also remove janitors, provided the removal is approved in writing by a majority of the inspectors for the district, and provided further, that any teacher so removed shall have a right to appeal to the Board of Education, under such rules as it may prescribe ; and the said board shall have power, after hearing the answer of the trustees, to re-instate the teacher" (*Laws of 1864*, p. 825).

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Now as the power to appoint and remove principal teachers is vested in the Board of Education, it follows that the resignation of a principal must be sent to that board and accepted by them, before a vacancy can arise. (*People agt. Carrique*, 1 *Hill*, 93; *People agt. Comptroller*, 20 *Wend.* 595; *People agt. Mayor, &c.* 5 *Barb.* 43; *Laimbeir agt. Mayor, &c.* 4 *Sandf.* 109.)

It is not alleged nor pretended that Wood's resignation was ever sent to the Board of Education, or was ever received or accepted by them. (*See affidavit of Banks.*)

(b) Besides the Revised Statutes provide that the resignations of all public officers other than those officers who are particularly specified in article 4, chapter 5, of title 6, of part 1, shall be made to the body, officer or board that appointed them (1 *R. S.* p. 413, 5th ed.).

The Board of Education had the power to appoint principal teachers at the time it is alleged Wood resigned (*Laws of 1864, supra*).

VII. The nomination of Mr. Holley, even if properly made, gives him no right to the office of principal teacher of ward school No. 49.

Under the statute of 1864, to entitle a party to the office of principal in a ward school, two things must concur :

1st. He must be nominated by the trustees in the manner pointed out by the statute.

2d. He must be appointed by the respondents. (*Laws of 1864*, p. 825, § 12, see § set out under 6th point; *White agt. Mayor, &c. of N. Y.* 4 *E. D. S.* 563.)

(a) The case of *White agt. The Mayor, &c., of New York*, is strongly in point in this connection.

In that case it appeared that the commissioner of streets and lamps notified Glover (the incumbent of the office of superintendent of streets), that White, the plaintiff, had been appointed to the office in question by him. The commissioner had the power to nominate, and by and with the consent of the board of aldermen, to appoint to such office.

It was held that until the board of aldermen had confirmed

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White's appointment, Glover still remained in office (4 *E. D. Smith's Rep.* 563).

The difference between the case of White and this, is one in favor of the respondents here, because the respondents not only have the confirming power, but also the appointing power.

VIII. It is obvious that the power of appointment which is vested in the Board of Education by the act of 1864, is one involving the exercise of discretion, and that the power on the part of the trustees to nominate, gives them no right to insist that the Board of Education shall confirm their nomination.

(a) The elementary rule in the construction of statutes is, that the court should, from the whole scope and object of the statute, ascertain what the intent of the legislature was in passing the statute. (*Mayor, &c. agt. Walker*, 4 *E. D. S.* p. 268, *per* INGRAHAM, *F. J. delivering the opinion of the court.*)

So too, the general system of legislation upon the subject matter of a statute may be taken into view in order to aid the construction of a particular statute relating to the same subject. And a statute should be so construed as to suppress the mischief intended to be remedied. (*Fort agt. Burch*, 6 *Barb.* 60, 69, 71; *Jackson agt. Collins*, 3 *Cow.* 89.)

And whenever the intention of the legislature can be discovered, it should be followed with reason and discretion, though such construction may seem contrary to the letter of the statute. (*Jackson agt. Collins*, 3 *Cow.* 89; *People agt. Utica Ins. Co.* 15 *Johns.* 380; *Margate Pier Co. agt. Hannan*, 3 *B. & A.* 266; *Edmonds agt. Dick*, 4 *B. & A.* 212, *per* HOLROYD, *J.*; *Rice agt. Mead*, 22 *How. Pr.* 449.)

(b) Applying the principles above stated to the statute under consideration, we say that the relator's construction of the act of 1864 is erroneous. This is apparent from previous legislation upon the subject, and from the mischief which the act of 1864 was designed to remedy.

Prior to the act of 1864, the power to employ and remove principal teachers was vested solely in the trustees. (*Laws of 1851*, p. 740, 741; *Laws of 1854*, p. 241.)

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It had been decided in March, 1864, by this court at special term, that under the above cited statutes, the Board of Education could not interfere in any manner to supersede or set aside the decision of the trustees in the matter of the appointment or removal of teachers. (*McHugh agt. Board of Education*, 27 *How. Pr. R.* p. 463, decided at Special Term by SUTHERLAND, 1864 ; affirmed by General Term, 1864. Opinion by CLERKE, J. BARNARD and LEONARD, JJ. concurring.)

In April, 1864, after the decision of Judge SUTHERLAND, the act in question was passed, and the respondents contend that the object and design of the legislature was to confer upon the Board of Education a supervisory power which would enable them to control the trustees of the various wards. For this purpose they gave the Board of Education the power to appoint the principal and vice principal teachers, leaving to the local boards merely a nominating power, and they gave to the inferior teachers, whom the trustees still have the power to appoint, the right to appeal from any action of the trustees in relation to their removal.

In this way the mischief of the statutes of 1851 and 1854 was remedied.

The act of 1864 having been passed so closely upon the decision of this court in *McHugh's* case, the conclusion irresistably follows that it was passed to remedy the mischief or defect which that decision showed existed in the previous acts.

(c) The construction of the relator's counsel frustrates the whole object of the act of 1864.

It does not remedy the mischief contained in the acts of 1851, and the amendatory act of 1854. It leaves that mischief still subsisting, because under such construction the Board of Education become merely the registers of the nominations of the trustees, and the appointment is really made by the trustees.

(d) The error of the relator's counsel consists in looking only at the mere letter of the law. He supposes that the words "shall be appointed," as used in the 12th section,

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are imperative, and make it incumbent upon the respondents to appoint whomsoever the trustees may nominate.

In ordinary cases it is true that the word "*shall*," imposes an imperative duty when used to define the powers of public officers in a public statute. Where, however, such a construction would defeat the whole object of the act in which the word is contained, as gathered from other parts of the act, such a construction will not be adopted by the courts (*Cases supra*).

IX. If the court should, however, be of the opinion that the decision of the court below was incorrect, the respondents ask to have the case remitted to the special term, so that they may read the affidavits prepared in opposition to the motion of the relator, the reading of which was rendered unnecessary by the decision of the court against the relator on the opening of his counsel. This right was reserved to respondents by the order of the special term; and the affidavits will in fact show that Mr. Wood never, in contemplation of law, resigned the position to which Mr. Holley aspires.

X. The order of the special term should be affirmed, with costs.

By the court, CLERKE, J. I. The act of 1864 declares that principals and vice principals shall be appointed by the Board of Education upon the written nomination of a majority of the trustees of the ward.

The actual appointment then, is vested exclusively in the Board of Education. It necessarily follows that the power of removal is also vested exclusively in them; for if the trustees were permitted to exercise this latter power, they could at all times nullify the power of appointment given expressly to the Board of Education. The former could remove as fast as the latter may appoint. If the Board of Education then, have the exclusive power of removal, they alone have the power of deciding when a vacancy has occurred, whether by resignation or otherwise; which includes the power of accepting or not accepting a proposed resignation. Conse-

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quently, the tender of resignation by a principal or vice principal, should be directed and delivered to the Board of Education, who alone have the power of accepting or not accepting it.

There was not, in the present case, any resignation by Wood to the Board of Education, and no acceptance by them of his intended resignation. This is essential to consummate a resignation; until this is done either by express acceptance or by the appointment of another in his place, an incumbent is never legally out of office. "Otherwise an unworthy person, guilty of the most flagrant violation of his duty, could by voluntary action on his part, in many cases, escape a trial and the deserved ignominy of a dismissal" (*The People ex rel. McCune agt. The Board of Police*, 26 Barb. S. C. R. 501). No vacancy having actually existed, the Board of Education were not bound to take any notice of the nomination by the trustees.

II. Even if there was a vacancy, we could not grant this particular application. We are asked to compel the Board of Education to appoint Abner B. Holley. Why? Merely because he was nominated by the trustees. This would be giving the appointment, instead of the nomination, to the trustees, in direct contravention of the act. Under no circumstances could we do anything more than compel the Board of Education to proceed to consider the nomination, and to exercise the discretion which the legislature has vested in them. We could not interfere with that discretion and order that the will of the trustees, or our will, should dominate over it.

The order must be affirmed, with costs.

Morange agt. Morris.

COURT OF APPEALS.

HENRY H. MORANGE, respondent agt. **PETER MORRIS**, appellant.

Where by the terms of an agreement under seal, the plaintiff was to pay a certain sum in cash, and assumed certain mortgages mentioned in the agreement, and to execute his bond and mortgage for the balance, on a particular day, and the defendant on receiving such payments and the bond and mortgage on that day, was to convey to the plaintiff certain lots in fee, *free from all incumbrances*, except said mortgages and a certain lease :

Held, that these several acts were to be performed at the same time, and the obligations of the parties in respect to them were, therefore, *mutual and dependent*.

Ordinarily, in such case, it is incumbent on each party to perform or tender a performance on his part, in order to put the other party in default.

But where, as in this case, the defendant was unable to perform his agreement, for the reason that the premises were incumbered with the liens for taxes and assessments, admitted in the answer, the plaintiff was excused from tendering payment and offering to perform on his part, on the day specified.

A *tender of performance* need not be made when it would be wholly nugatory. The existence of the incumbrances at the time fixed in the agreement for the execution and delivery of a deed, was a *breach of the agreement* on the part of the defendant, which put it out of his power to perform, and excused the plaintiff from tendering performance.

June Term, 1866.

APPEAL from a judgment of the supreme court in the first district affirming a judgment upon a verdict in favor of the plaintiff, which was ordered on the pleadings.

The complaint stated that on the 5th day of August, 1857, the parties entered into an agreement in writing, under seal, whereby the defendant agreed to sell to the plaintiff ten certain lots of land therein described, in the city of New York, for the sum of \$30,000, which the plaintiff agreed to pay to the defendant in manner following: \$1,500 on the execution of the agreement, the receipt of which was acknowledged; \$13,500 in cash on the 21st of September then next, and by assuming four certain mortgages therein described, amounting to \$7,500, and the balance of \$7,500 by the bond and mortgage of the plaintiff on said lots upon the terms and conditions specified in the agreement; and the defendant agreed, on receiving such payments in cash,

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and the bond and mortgage aforesaid, at the time agreed on, he would execute and deliver to the plaintiff a proper deed for the conveying and assuring to him the fee simple of said lots, free from all incumbrances except said mortgages. The complaint further stated that the plaintiff paid the sum of \$1,500 on the execution of the agreement, and that on the said 21st of September, he was ready and willing to perform the other conditions on his part ; that he (the defendant) did not then perform on his part, and was unable to convey to the plaintiff the fee simple of said lots free from all incumbrances, except those mentioned in the agreement, and that on that day said lots were, and ever since have been incumbered with certain liens and charges for taxes and assessments theretofore imposed upon said lots, amounting to the sum of \$1,615.96, by reason whereof the plaintiff rescinded said agreement, and demanded that the defendant repay said sum of \$1,500, which he refused.

The answer denied the agreement set out in the complaint, and admitted the making of an agreement substantially like it in all respects, except that the lots were sold subject to a certain lease, which had about three years unexpired, and the plaintiff was to have the quarter's rent due on the 1st of August, 1857. The answer admitted the payment of the \$1,500 ; averred that on the 21st September defendant had a good title in fee, and was able and willing to convey the lots free from all incumbrances except those mentioned in the agreement, and that he executed and tendered a deed, sufficient for that purpose to the plaintiff, and demanded that he perform his part of the agreement ; but he refused, and alleged as the only reason for such refusal, that the lots were subject to said lease. The answer admitted that on the 21st September, the lots were, and ever since have been, incumbered with the liens for taxes and assessments set up in the complaint, but averred that defendant was willing on said 21st September, to pay said liens, and would have done so at that time, had plaintiff been ready and willing to perform the agreement, or had he objected to perform it for the reasons that said liens were unpaid. The answer set up a

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counter-claim for one quarter's rent of said lots due 1st August, 1857, in advance, received by plaintiff, amounting to \$125.

On the trial the plaintiff's counsel moved for judgment upon the pleadings, on the ground that it was averred in the complaint, and admitted by the answer, that on the 21st September, 1857, said lots were, and ever since have been, incumbered with said liens for taxes and assessments imposed before that day; and, therefore, the defendant was then, and ever since has been, unable to convey to plaintiff the fee simple of said lots free from all incumbrances, except those mentioned in the agreement. Therefore, the court ordered a verdict for the plaintiff for the amount claimed in the complaint, less the amount of counter-claim set up in the answer, with interest.

J. H. REYNOLDS, *for appellant.*

H. H. MORANGE, *respondent in person.*

JAMES C. SMITH, J. By the terms of the agreement the plaintiff was to pay the sum of \$13,500 in cash, and by assuming the mortgages mentioned in the agreement, and to execute his bond and mortgage for the remaining \$7,500 on the 21st September, 1857; and the defendant, on receiving such payments and the bond and mortgage at that time, was to convey to the plaintiff the lots in fee free from all incumbrances except said mortgages and the lease. These several acts were to be performed at the same time, and the obligations of the parties in respect to them, were, therefore, mutual and dependent. (*Gardiner agt. Carson*, 15 *Mass.* 500; *Grant agt. Johnson* 1 *Seld.* 247; *Holmes agt. Holmes* 5 *Seld.* 525; *Beecher agt. Conrade*, 3 *Kern.* 108.)

Ordinarily it is incumbent on each party to an agreement creating mutual and dependent obligations to perform or tender a performance on his part, in order to put the other party in default. There may be circumstances, however, which will excuse a party from such performance, and enable him to take advantage of the default of the other party.

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although he has not performed or offered to perform on his own part. A tender of performance need not be made when it would be wholly nugatory. For example: if the vendor in the present case, had expressly notified the plaintiff before the 21st of September, that he would not convey, and, therefore, the plaintiff need not tender the payment which the agreement required to be made on that day, he would have been excused from making the tender, as it would have been an idle ceremony. In like manner the conceded inability of the vendor to perform, excuses a tender of performance by the vendee.

In the present case the vendor was unable to perform his agreement, for the reason that the premises were incumbered with the liens for taxes and assessments, admitted in the answer. By his agreement, he was not only to convey a title in fee simple, but he was to convey and assure it free from all incumbrances except as therein specified, and the incumbrances referred to were not within the exceptions. The existence of the incumbrances at the time fixed in the agreement for the execution and delivery of a deed, was a breach of the agreement on his part, which put it out of his power to perform, and excuse the plaintiff from tendering payment. (*See Holmes agt. Holmes*, 12 Bar⁶ 137; *S. C. Aff.* 5 *Seld.* 525.)

The averment in the answer, that the defendant would have discharged the incumbrances on the 21st of September, if the plaintiff had been ready and willing to perform on his part, is wholly immaterial. The act of conveying the premises free from all incumbrances, was to be concurrent with that of the payment of the purchase money.

The plaintiff was under no obligation to pay his money to the vendor and trust to a remedy by action for damages, in case the vendor failed to remove the incumbrances. It was the duty of the defendant to have caused them to be discharged before the time arrived at which he had stipulated to convey.

Equally immaterial is the averment that the defendant would have discharged the incumbrances on the 21st of Sep-

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tember, if the plaintiff had objected to perform for the reason that they were unpaid. By objecting to the deed on the ground that it was subject to the lease, the plaintiff did not waive the objection that the premises were incumbered, nor subject himself to the alternative of accepting a deed subject to the incumbrances or forfeiting what he had paid. This view of the case is not in conflict with the cases cited by the appellant's counsel. In *Boardman* agt. *Sill* (1 *Camp.* 410), and *White* agt. *Gains* (12 *Bing.* 231), a bailee of goods was held to have waived his lien for charges, by claiming to be the general owner. In *Winne* agt. *Reynolds* (6 *Paige*, 407), and *McWhatter* agt. *McMahon* (10 *Id.* 386), bills were filed for specific performance. In the former there was a trifling incumbrance known to the vendee when he contracted, easily removable, and time was not of the essence of the contract. In the latter the incumbrance was merely nominal. In *Carman* agt. *Pultz* (21 *N. Y.* 551), there was a defect in the form of the deed which could have been remedied if it had been pointed out. These cases have no bearing upon the question before us.

I think the judgment should be affirmed.

♦

SUPREME COURT.

NATHANIEL S. SEBLEY and another agt. BARRAK T. NICHOLS.

Where a case on appeal is proposed, and the respondent makes affidavit that the stenographer's notes taken on the trial (or a portion of them) are necessary to enable him properly to propose amendments to the case, the expense of procuring such notes is a proper item of taxation in the adjustment of costs at the general term. (SUTHERLAND, *J. dissenting.*)

New York General Term, June, 1866.

Before BARNARD, P. J., SUTHERLAND and CLERKE, Justices.

THIS was an appeal from an order denying a motion to strike out of the costs an expense or disbursement of twenty dollars paid for copy stenographer's notes of trial of the

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cause, which was taxed by the clerk on adjustment of costs of general term.

The action was tried at circuit—verdict was for the plaintiff. The defendant appealed to the general term and served a proposed case. The affidavit of Mr. Brown shows, that in order to draw the proposed amendments it became necessary to have a copy of the stenographer's notes, which was produced, and twenty dollars (ten cents per folio) paid therefor to the stenographer, and which was the usual charge in such cases.

BROWN & ESTES, *for the plaintiff,*

cited *Code* (§ 311) ; *Finch* agt. *Culvert* (13 *How. Pr. R.* 13).

MILLER, STOUTENBURGH & MILLER, *for defendants.*

By the court, CLERKE, J. I think that whatever conduces to the better prosecution of the controversy *is necessary*. What prudence dictates is *necessary* ; without it the interests of the party would be unsafe.

Order of special term affirmed.

BARNARD, J., concurred.

SUTHERLAND, J., *dissented*. I am inclined to think that the twenty dollars paid by the attorney for the plaintiff for a copy of the stenographer's minutes, cannot properly be called an expense or disbursement *necessarily* incurred in the action. It may have been convenient and even prudent for him to procure such copy, but I am inclined to think it cannot properly be said to have been *necessary*.

The special provision in section 256 of the Code, allowing the expense, or one-half of the expense of the copy for the judge, as a disbursement by the prevailing party, tends to show this, I think. (*See Hamilton* agt. *Butler*, 30 *How. Pr. R.* 36.)

Upon the whole, though considering the affidavit of Mr. Brown, the attorney for the plaintiff, I do not consider the question free from doubt.

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I think the twenty dollars paid for the copy of the stenographer's minutes for the plaintiff or his attorney, should be deducted from the bill of costs as adjusted by the clerk, without costs to either party on this appeal.

SUPREME COURT.

JOSEPH H. MOORE agt. THE BOARD OF COMMISSIONERS OF PILOTS.

A platform or structure erected on piles, of about forty feet in length and twenty feet in width, in the North river, adjoining a pier, by a lessee thereof, is an obstruction to the free use and navigation of the harbor by the public, and, therefore, a public nuisance.

The board of commissioners of pilots, or any other party, cannot be interfered with by *infuntion* in proceedings to abate such nuisance.

New York Special Term, November, 1866.

THIS action was brought to restrain the defendants from proceeding to remove a platform or structure erected by the plaintiff in the slip south of and adjoining pier No. 14, North river. A preliminary injunction was granted by Judge SUTHERLAND, prohibiting the defendants from doing any act under a notice given by them, pursuant to section 2, of the act of April 27, 1860, requiring the plaintiff to remove the obstruction complained of. The defendants then moved on affidavits to dissolve the injunction. It appeared that the plaintiff is the agent of the Allentown Railroad Company, and as such, the lessee from the New Jersey Central Railroad Company, of the southerly half of pier No. 14, North river, and that for the accommodation of the freight received at that pier, he erected a platform on piles, extending into the slip from the bulkhead a distance of about forty feet in length and upwards of twenty feet in width. The commissioners of pilots claim that it is an unlawful obstruction of the harbor, and that they have the power to remove it.

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WILLIAM ALLEN BUTLER, *for defendants, and for the motion.*

I. The structure in question is wholly outside of the bulk-head line established by chapter 763, of the laws of 1857, and is, therefore, an unlawful obstruction in a public navigable harbor and highway, and is a public nuisance, irrespective of public or private convenience or inconvenience. (*The People* agt. *Vanderbilt*, 26 N. Y. 287; *Commissioners of Pilots* agt. *Clark*, 33 N. Y. 251; *The King* agt. *Ward*, 4 Ad. & E. 384; *Davis* agt. *The Mayor*, 4 Kern. 506.)

II. The plaintiff is thus shown to be a wrong doer, violating an express law of the state, and liable to be indicted and punished for a misdemeanor, unless by statute some special penalty is imposed for his wrong (2 R. S. 696, § 39).

Standing in this attitude, he is not entitled to the protection of the court, or its interference by injunction in aid of his violation of the law. If any officer or board of officers assume to prevent or punish his wrongful acts, without authority to do so, he should be left to his remedy against them as trespassers.

III. By section 2, of chapter 522, of the laws of 1860, the defendants, the board of commissioners of pilots, have express power to abate the nuisance in question. They are not limited to the removal of obstructions beyond the exterior pier line. The law applies equally to the exterior bulk-head line, and with much more practical necessity, because it is the structures erected within the pier line adjacent to the bulkheads, which are the most frequent and persistent.

By referring to the Harbor Commissioners' report (*Senate document No. 40, 1857*) the act of 1857 (*Sess. Laws 1857, p. 638, vol. 2*), and the act of 1860 (*Sess. Laws 1860, p. 1063*), it will appear that the exterior line of bulkheads was just as important, and just as much in contemplation of the law, as the exterior pier line, and the violation by plaintiff is just as much denounced as if he had built his platform outside of the pier line.

IV. But it is wholly immaterial whether the act of 1860

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give the defendants an express authority to abate this nuisance.

Being a public nuisance in the navigable waters of the state, any one has a right to abate it. (*See Viner, tit. Nuisance; T. Pl. 3; W. Pl. 4; Com. Dig. tit. Action for Nuisance, D. 4; James agt. Hayward, Cro. Charles, 184; Houghton agt. Butler, 4 T. R. 364.*)

Especially any party aggrieved may abate it, and this board, whose special duty it is to protect the harbor from encroachment, are a party aggrieved by any such illegal structure.

It is well settled that no injunction will be allowed in favor of a wrong doer against a public body having such relations to the subject as give them an oversight of it, even though they are not expressly constituted to enforce the law. (*Hart agt. The Mayor of Albany, 9 Wend. 571, and opinion by SUTHERLAND, J. p. 590.*)

V. An injunction of this kind can only issue in cases of apprehended irreparable injury. But no injury can be predicated of the removal of an illegal structure like this; its violent and immediate taking away, even by a private hand, would be *damnum absque injuria*.

VI. The preliminary injunction should be dissolved, with costs.

J. W. DIMMICK, *for the plaintiff, opposed.*

On the part of the plaintiff, it was contended that the defendants were only authorized as a board to take proceedings to remove obstructions which were beyond the exterior or pier line, and this structure being inside of that line, the defendants should be restrained from interfering with it.

SUTHERLAND, J., said, that the questions presented on this motion were of the greatest public interest and importance; that he was clearly of opinion that the defendants were entitled to a dissolution of the injunction on the ground that the structure in question, being in the navigable waters of

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the harbor, and at a point where the law prohibited the placing of any structure, it was an obstruction to the free use and navigation of the harbor by the public, and, therefore, a public nuisance; that the plaintiff was not entitled to the protection of the court by injunction, against interference by the defendants or any other party, and placing the decision solely on this ground, the injunction must be dissolved.

Injunction dissolved with \$10 costs to defendants, to abide the event.

SUPREME COURT.

THOMAS WILLIAMS agt. EUGENE MURRAY.

On an appeal from an order of an inferior court to the supreme court, the costs are not limited to ten dollars, but are governed by subdivision 5, of section 307 of the Code, and follow as a matter of right, the same as on an appeal from a judgment.

But where the court inadvertently fixed the costs at ten dollars in the order of affirmance, it was held to be irregular for the clerk to tax the full costs in disregard of the order. Application should have been made to the court to correct the order.

Broome General Term, July, 1866.

Before PARKER, MASON, BALCOM and BOARDMAN, Justices.

MOTION to set aside order and taxation of costs, procured to be entered by the defendant with the clerk of the county of Otsego. The facts are sufficiently stated in the opinion of the court.

L. L. BUNDY, *for plaintiff.*

H. STURGES, *defendant.*

By the court, PARKER, P. J. This action was originally commenced in a justice's court, in which the plaintiff obtained judgment against the defendant. The defendant brought an appeal to the Otsego county court. The plaintiff thereupon moved in the county court for a dismissal of the appeal, on the ground of certain alleged irregularities,

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which motion was denied. From the order denying the motion, an appeal was taken to this court, where the order of the county court was affirmed, with \$10 costs, as specified in the order of affirmance. The defendant's attorneys, disregarding the fixing of the costs by the court at \$10, made up a bill of costs under subdivision 5, of section 307 of the Code, amounting to \$60.59, and procured the same to be taxed by the clerk of Otsego county, and an order to be entered by the clerk that the defendant recover the same.

A motion is now made to set aside that order as unauthorized and irregular. The order complained of was entered at large in the clerk's office of Otsego county, from the brief order made at general term, in which the court fixed the costs of the appeal at \$10. Whether this fixing of the costs was erroneous or not, it was the order made by the court, and it was clearly irregular for the defendant's attorneys to disregard it, and enter an order different in respect to costs from the one made by the court. An improvident order is to be regarded until set aside, and if this one was such, the proper course of the defendant's attorneys was to move the court to correct it. (2 *Cow.* 463 ; 4 *Hill*, 554 ; 10 *How.* 415.) It cannot be said that the order was a nullity, even if the defendant was under the Code entitled to the costs claimed, more especially as the proceeding in which they were incurred was an interlocutory proceeding in the action—and by section 311 of the Code, it belonged to the court and not to the clerk to adjust the costs. At most, then, the fixing of them at \$10 was erroneous, and binding, therefore, upon the parties, until corrected by an order of the court.

On the decision of the question raised by the appeal, the question of costs of the appeal was not considered, but the case was regarded, as well by the counsel, in the manner of its presentation, as by the court, as a special motion, and motion costs only were therefore allowed. It may be well, therefore, now to examine the question ; for if the defendant is right upon the question of amount, and wrong only in his mode of proceeding to reach it, that fact may induce us to modify the order which we should otherwise make.

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The appeal was from an order of the county court, and brought by virtue of section 344 of the Code. Subdivision 5, of section 307 of the Code, which provides for costs on appeal in this court, is as follows: "To either party on appeal, except to the court of appeals, and except appeals in cases mentioned in section 349, before argument, \$20, for argument, \$40; and the same costs shall be allowed to either party before argument, and for argument, on application for judgment upon special verdict, or upon verdict subject to the opinion of the court, or for a new trial on a case made, and in cases where exceptions are ordered to be heard in the first instance at a general term, under the provisions of section 265." This is an appeal to the supreme court from an inferior court, under chapter 3, of title 11 of the Code (§ 344), and it is clear that it is not within any other exception contained in the subdivision of section 307, above set forth, but stands so far as this section is concerned, on the footing of an appeal from a judgment of an inferior court.

There is no other section of the Code which applies to this question, unless it be section 315, which is as follows: "Costs may be allowed on a motion, in the discretion of the court or judge, not exceeding ten dollars, and may be absolute, or directed to abide the event of the action."

It is insisted by the plaintiff's counsel, that the application to the court upon the appeal was a motion, and, therefore, the defendant was entitled to motion costs only, as allowed by the court. If it is a motion, it is like the other cases provided for in said subdivision 5, an enumerated motion (*Rule 40*). It is also an appeal, and the costs of an appeal in such a case, are specifically provided for by section 307, as already seen. Hence the motions contemplated by section 315 do not include such as this, which are provided for by section 307. In *White agt. Anthony* (23 N. Y. 164), it was held that an appeal from an order carried the same costs in the court of appeals as an appeal from a judgment, the costs depending upon subdivision 6, of section 307, which makes no exception of appeals from orders from its provisions. An appeal from an order in the court of appeals, is

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no less a motion than such an appeal in this court, and if section 315 does not control the costs upon such an appeal there, it cannot here. As, therefore, the exception in subdivision 5, of section 307, does not include this case, the defendant was entitled to the costs specified in that subdivision, being the amount at which the clerk taxed them.

Inasmuch as we see that upon the merits, the defendant is entitled to the costs which he has taxed, which would have been granted him upon an application to correct the order made by the court, we may, as the case is now before us, do justice to the parties in the premises, without requiring the matter to be again brought up for that purpose. The defendant must suffer the penalty of his irregularity, and his order must be set aside with \$10 costs, unless within twenty days he pays the plaintiff \$10 costs of this motion. If such payment is made, the order of the general term is to be corrected, and the order complained of is to stand as the order of the court.

Ordered accordingly.

SUPREME COURT.

WILLIAM B. JAUDON AND CHARLES JAUDON agt. DANIEL S.
READ, impleaded, &c.

Where there is no evidence produced on the trial dispensing with the notice of demand and non-payment to the drawer of a dishonored check, and no such demand and notice having been proved, the plaintiffs are not entitled to recover upon it against the drawer.

New York Special Term, December, 1866.

MOTION for a new trial. This was an action against the drawer of a check. The check was presented to the bank upon which it was drawn and payment refused, but no notice of non-payment was ever given to the drawer.

On the trial, to excuse the non-service of notice of protest, the plaintiffs each testified that after the commencement of

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this action the defendant stated in their presence that he stopped the payment of the check.

The defendant testified that he did not say so, and that he did not in fact stop its payment.

The jury found a verdict for the plaintiffs.

IRA D. WARREN, *counsel for the defendant,*

moved to set aside the verdict and for a new trial, on the ground that there was no evidence which would sustain the verdict of the jury.

That it was immaterial what defendant said ; the *fact* was sworn to by him that he did not stop the payment of the check. That he did not in *fact* stop the payment of the check, repelled any presumption that might have arisen from what he said, as the plaintiffs had not in any way acted on it, nor been misled by it. That there was no dispute about the *fact*, whatever there might be about what the defendant had said.

E. M. WIGHT, *for plaintiffs,*

claimed that there was conflicting evidence upon the question whether or not the defendant stopped the payment of the check, and that their finding was conclusive.

MULLEN, J. Motion for a new trial granted, on the ground that there is no evidence in the case dispensing with the notice of demand and non-payment to Read.

SUPREME COURT.

JESUP agt. JONES.

New York Special Term, June, 1864.

The affidavit upon which an order for the examination of the defendant in this action as a judgment debtor, was

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granted, showed that the plaintiff recovered a judgment against the defendant in this court on the 27th October, 1862, for \$489.53; that the judgment roll was filed in the office of the clerk of the city and county of New York; that an execution upon said judgment against the property of the defendant was on the 3d day of November, 1862, duly issued to the sheriff of said county, where said defendant then had a place of business, which said sheriff had returned wholly unsatisfied, and that said judgment remains wholly unpaid.

On the return of said order, a motion was made on behalf of the defendant, that said order be discharged for want of jurisdiction in the judge who granted it, because it did not appear in the affidavit upon which the order was issued, either that the defendant now has a place of business or resides in this county.

HENRY N. BEACH, *for plaintiff.*

T. D. SHERWOOD, *for defendant.*

LEONARD, J. held, that on the authority of the general term of this court in this district, in the case of *Bingham agt. Disbrow* (14 Abb. 251), it is immaterial where the debtor resides at the time the order for his examination is issued; it is sufficient to confer jurisdiction, if it appear in respect to the residence of the judgment debtor, under the first subdivision of section 292 of the Code, that the execution was issued to the sheriff of the county where he then resided or had a place of business, &c., and as a matter of course it follows that the order must be made returnable before the judge at a time and place specified in the order, "within the county to which the execution was issued." The motion was denied, and defendant ordered to go on with his examination. (*See also McEwan agt. Burgess*, 25 How. 92.)

Dry Dock, &c., Railroad Co. agt. The New York, &c., Railroad Co.

SUPREME COURT.

THE DRY DOCK, EAST BROADWAY AND BATTERY RAILROAD COMPANY, appellants agt. THE NEW YORK AND HARLEM RAILROAD COMPANY, THE EAST RIVER FERRY COMPANY AND OLIVER CHARLICK, respondents.

JAMES M. WATERBURY AND THE EAST RIVER FERRY COMPANY agt. THE DRY DOCK AND EAST BROADWAY AND BATTERY RAILROAD COMPANY, AND THE NEW YORK AND HARLEM RAILROAD COMPANY.

This is an appeal by the plaintiffs in the first above entitled action, from the decision of the special term of this court, as reported in 30 *How. Pr. R.* 39.

It was there *held* that by an act of the legislature in 1826, the title to all lands four hundred feet east of low water mark on the shore of the East river, was vested in the mayor, aldermen and commonalty of the city of New York.

That the city of New York had a right under that act, to convey any of the lands embraced within its provisions. And having in 1847 conveyed certain lands under water east of First avenue, except a space of one hundred feet in width eastward from First avenue, and in continuation of Thirty-fourth street, to the Farmers' Loan and Trust Company, with covenants by the grantees, their successors and assigns, to fill up the same, and erect and make a good and sufficient wharf, avenue or street, one hundred feet in width, from First avenue to Avenue A, and keep in good order said street, wharf and avenue, which should thereafter continue to be a public street of the city; and the Farmers' Loan and Trust Company having conveyed said premises, subject to the same provisions and conditions, to the East River Ferry Company and James M. Waterbury, who are engaged in filling in the land owned by them, including said continuation of Thirty-fourth street, one hundred feet wide to Avenue A, in pursuance of the original grant from the corporation:

Held, that upon the completion of the work, and when the land was filled in, graded, regulated and paved, for the purposes of a public street, it was the intention of the city, who made the conveyance, to dedicate it as one of the public streets of the city. But it was no part of the contract that it should be thus appropriated while the work was in progress, and during that period the title to the property remained in the corporation, while the right to its possession and control, and its use for the purposes intended, was in the grantees who had contracted to perform the work, until its completion, its adaptation to the public use, and some act done evincing the entire fulfillment of such contract, and discharging the parties who had agreed to perform the work, and from the obligations imposed upon them: Therefore, until the fulfillment of such contract, and the finishing of the street, no railroad company had any right to enter upon the premises and disturb the possession of the grantees. And upon their doing so, a remedy existed by injunction.

The *general term* on this appeal *held*, that it appeared from the papers in this case, that Thirty-fourth street, or the strip of land one hundred feet wide to a point

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about two hundred and seventy-seven feet easterly, from the easterly side of First avenue, and to which the ferry house had been removed, had been so far filled out and graded as to be constantly used by the public in going to and from the ferry, and for common highway purposes generally. Therefore, either of the railroad companies had a right, as to Waterbury and the ferry company, to construct and extend their tracks through and over Thirty-fourth street, as far easterly as the grading or condition of the street would permit. The injunction at the suit of Waterbury and the ferry company, restraining the railroad companies, should be vacated with costs. (CLERKE, *J. dissenting.*)

It was also *held* by the special term, that by the act of 1849, The New York and Harlem Railroad Company, were authorized to construct a branch from their railroad to the East river, to such point as might be designated and permitted by the corporation of the city of New York; and that in March, 1864, the corporation selected a point on the East river to which the said railroad might be constructed, and gave the requisite permission to extend their road through *Thirty-fourth street to the East river* :

Held also, that the act of 1849 must be considered in connection with the permission granted by the corporation in 1864; and as the privileges granted were bestowed prior to the act of 1860, under which the Dry Dock, East Broadway and Battery Railroad Company claim to act, the New York and Harlem Railroad Company have *precedence in using the space in continuation of Thirty-fourth street, when completed.*

The *general term* on this appeal *held*, that before the Dry Dock, East Broadway and Battery Railroad Company actually commenced taking a qualified possession of the center or middle of that part of Thirty-fourth street, or the strip of land, by locating and constructing their extension, *either railroad company* had a right to make their extension through or along the center or middle of the street or strip, to the exclusion of the other from that particular location. There was no principle upon which the court could favor the right of either company thus to locate their extension, to the exclusion of the other, *before any actual attempt at such location.*

But the Dry Dock, East Broadway and Battery Company, by first actually taking a qualified possession of the center or middle of the street or strip of land, by locating and constructing their extension as far as they did, until interfered with by the agents or servants of the Harlem Railroad Company, *acquired the right to complete the construction of, and to operate their extension to the ferry, or as near to it as the condition of the street or strip of land and the convenient operation of the ferry would permit, to the exclusion of the right of the Harlem Railroad Company to interfere in any way with the construction or operation of the Dry Dock, East Broadway and Battery extension as thus located.* The order in this action between the railroad companies, and in which Oliver Charlick and the ferry company are parties defendants, should be *reversed*, and the injunction which was vacated by it restored and continued, with costs to the plaintiffs, to be paid by the Harlem Railroad Company. (CLERKE, *J. dissenting.*)

New York General Term, June, 1866.

Before BARNARD, P. J., SUTHERLAND and CLERKE, Justices.

THE Dry Dock, East Broadway and Battery Railroad Company, on 18th June, 1865, laid rails in Thirty-fourth street east of First avenue, which were almost immediately

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torn up and destroyed, and the New York and Harlem Railroad Company proceeded to lay down their own tracks. The Dry Dock Company then commenced suit, and obtained injunction against the Harlem Railroad Company and Oliver Charlick, restraining them from interfering with the Dry Dock Company, in the use of the tracks laid upon the location adopted by them. The East River Ferry Company and James M. Waterbury then commenced suit against both railroad companies, and procured injunctions to restrain them from constructing tracks upon a space in dispute one hundred feet wide, which they had filled in, pursuant to grant to Farmers' Loan and Trust Company.

Motions were made to dissolve both injunctions, which were heard before Justice MILLER, at Hudson, on 7th July, 1865, who dissolved the injunction obtained by the plaintiffs in the first suit, and continued the injunction obtained by the ferry company. (*See full statement of the case, 30 How. 39.*)

The Dry Dock, &c., Railroad Company appealed from both orders to the general term.

H. W. ROBINSON, *counsel for Dry Dock, East Broadway and Battery Railroad Company.*

The main question presented in these cases is as to the right of the Dry Dock and Battery Railroad Company to maintain and use a railroad track, which they had constructed on the 17th and 18th days of June, 1865, and laid from their railroad track in the First avenue, easterly through Thirty-fourth street, towards the East river, to a point two hundred and seventy-seven feet of the easterly side of First avenue (*Case in first suit pages 3 to 5*), under the authority conferred by the act passed April 17, 1860 (*chap. 512*), of which grant they are the assignees.

This act authorizes the grantees and their assigns "to construct, maintain and operate a railroad," upon various routes, and among others (*Sess. Laws 1860, p. 1039*), "through and along First avenue, with a double track to

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Thirty-fourth street; thence through and along Thirty-fourth street, with a double track to Avenue A," &c.

Under it they had constructed a double railroad track in Thirty-fourth street, east of First avenue, which the defendants, or some of them, on the night of the 18th June, 1865, destroyed and broke up, and the New York and Harlem Railroad Company immediately entered on the same track, and extended a railroad on and over the sleepers and ties laid by the Dry Dock, East Broadway and Battery Railroad Company, and on the 19th began running cars thereon, and rendered the track laid by the latter company useless. (*Case in first suit, p. 8.*)

Upon a complaint and affidavit presenting these facts, an order was granted by Judge INGRAHAM, requiring the defendants to show cause why they should not be enjoined (as prayed for in the complaint), from interfering with the plaintiffs constructing, maintaining and using their railroad tracks upon the location in and upon which the railroad structure and tracks of the plaintiffs were laid and placed, in Thirty-fourth street and First avenue, previous to and on the evening of the 18th day of June, 1865, and a temporary injunction was granted to the same effect, which also restrained the New York and Harlem Railroad Company from using or interfering with such track and structure. (*Case, first suit, p. 11.*)

This order the New York and Harlem Railroad opposed by affidavits, setting up in defense the provision of the act of 1849, chapter 75, section 3, which authorizes them "to construct a branch for their road to the Hudson river, authorized by their original charter, from any point upon that road north of Twenty-seventh street, to any point on the Hudson river which may be designated and permitted by the corporation of the city of New York, and also to construct a like branch from the said road to the *East river*, at such point as may be designated and permitted by the corporation of the city of New York."

On the 8th day of March, 1864, the corporation by resolution, granted them permission "to extend this road from

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the Fourth avenue, with double track through Thirty-fourth street to the East river." Under this authority they had extended "a double track from the Fourth avenue easterly through Thirty-second street, Lexington avenue and Thirty-fourth street, to the easterly side of the First avenue." They allege that *they intended, and had made preparations* to prolong and extend their track further east, to the new ferry house on the East river, at the foot of Thirty-fourth street, when, as they allege, the Dry Dock, East Broadway and Battery Railroad Company intruded and laid tracks on the site they intended to occupy, and intentionally interfered with their plans (*Case, first suit, p. 15*); that on this space east of First avenue, there is no room for more than one set of double tracks, or for more cars than theirs (*p. 16*); that it would be utterly impossible to locate a railroad to the ferry in any other place than the location selected by them (*p. 17*), and from these circumstances claim prior and exclusive right to occupy the *locus in quo* for railroad purposes.

The East River Ferry Company were the assignees of a lease from the corporation of the right of running a ferry "from the foot of Thirty-fourth street across the East river, to Hunter's Point, L. I.," and claim to be the owners in fee of one hundred feet square at the north-east corner of the block east of First avenue, between a line in continuation of the northerly line of Thirty-third street and a line in continuation of the southerly line of Thirty-fourth street and the exterior bulkhead line, as established by law, and also of the south-east corner, about one hundred feet square of the block, north of the line in continuation of the northerly line of Thirty-fourth street and southerly line of Thirty-fifth street, and east of First avenue.

James M. Waterbury, one of the plaintiffs in the second suit, claimed to be the owner in fee of the block of ground east of First avenue, between a line in continuation of the northerly line of Thirty-third street and a line in continuation of the southerly line of Thirty-fourth street and the exterior bulkhead established by law, except the one hun-

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dred feet square, the north-east corner thereof, owned by the East River Company.

The title of both the East River Ferry Company and James M. Waterbury was derived through chapter 58, of laws of 1826, granting four hundred feet from low water mark, and a deed of this and other property executed by the mayor, aldermen and commonalty of the city of New York to the Farmers' Loan and Trust Company, dated January 29, 1847. (*Set out on page 24, &c., of Case, in second suit.*) The premises assumed to be conveyed by that deed were then covered by water, and lay below high water mark on the East river, which ran some one hundred and sixty-sevenths of two hundred and forty-six feet west of the present extension of First avenue at Thirty-fourth street. Thirty fourth street to the width of one hundred feet, and other streets and avenues, as laid out on the map of the commissioners appointed under the act of 1807, were protracted and extended over the premises conveyed, into the East river to the east side of Avenue A; and the title to all those streets and avenues was reserved in the corporation of the city of New York. (*See map.*) The deed contained a covenant on the part of the grantees, for themselves, their successors and assigns, that they would "within three months next after they should be thereunto required by the said party of the first part, or their successors, but not until they should be thereunto required, at their own proper cost" (*page 28, Case in second suit, fol. 99*), build certain wharves or streets, and among others, "a good or sufficient wharf, avenue or street, one hundred feet in width, separating and lying between the third and fourth above described premises (the blocks between Thirty-third and Thirty-fourth streets, and between Thirty-fourth and Thirty-fifth streets), extending from First avenue to Avenue A, being a portion of the intended new street called Thirty-fourth street, as the same is designated on the map hereunto annexed (*fol. 101*); also a like wharf, avenue or street, one hundred feet in width, "extending from where high water line crosses Thirty-fourth street to First avenue, being a portion of the intended new

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street called Thirty-fourth street " (*fol.* 104), " in front of the entire width of the southeasterly end of Thirty-fourth street " (*fol.* 108); also, " from time to time, and at all times hereafter, uphold and keep in good order and repair, all such streets, bulkheads, wharves and avenues " (*fol.* 110); and that the said streets and avenues should " forever thereafter continue to be and remain public streets and avenues and highways, for the free and common use and passage for the inhabitants of the said city, and all others passing and repassing by and through and along the same, in like manner as the other public streets, avenues, bulkheads and wharves of the said city, now are or lawfully ought to be " (*fol.* 111). And in case of default in these covenants, the parties of the first part might do the work, and recover from the grantees the cost thereof, " or sell and dispose of the whole of the said hereby granted premises, or any part thereof, at public auction " (*fols.* 112, 113), or re-enter and grant the same to any other persons (*fol.* 114). The grantees also covenanted not to build such wharves, avenues and streets, or any part thereof, or make the land in conformity to such covenants," until permission for that purpose should be first had and obtained from the corporation (*fol.* 116).

In case of breach of covenant, the deed was to become null and void, and a right of re-entry was given (*fol.* 122).

There is no pretense that the corporation has ever required the grantees or their assigns, to fill in Thirty-fourth street (*see complaint in second suit, fol.* 12), but James M. Waterbury and the East River Ferry Company, claiming and holding under this deed, had, of their own accord, filled in this space of one hundred feet wide known as Thirty-fourth street, and graded and prepared it for public travel thereon as a public street, to the ferry house and landing at the foot of Thirty-fourth street, about three hundred and ten feet easterly from the First avenue (*page 4 in first suit*), but the filling in and grading was not entirely completed. They claim also to have been engaged in the construction of a sewer in some part of Thirty-fourth street east of First avenue; that the laying of the railroad tracks interfered with

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the construction of this sewer, and hindered and impeded them in the work of filling in, regulating and paving the said space, and delayed and embarrassed them in complying with the terms of said covenant. (*Fol.* 134, *first suit* ; *fol.* 27, &c. *in second suit*.) For this cause the second suit was commenced by James M. Waterbury and the East River Ferry Company, and an injunction obtained against the Dry Dock, East Broadway and Battery Railroad Company, and the New York and Harlem Railroad Company (*page* 13, *of Case in second suit*), which the first named company on their verified answer, moved to dissolve (*fol.* 46).

After a hearing of all the parties upon these motions, before Judge MILLER, he made an order in the first suit dated July 7, 1865, denying the continuance of the injunction granted by Judge INGRAHAM, and dissolving the temporary injunction (*page* 40), and made an order in the second suit (*page* 35, *second suit*). granting an injunction against both railroad companies.

Appeals are taken by the Dry Dock, East Broadway and Battery Railroad Company from these orders.

I. The passage of the act authorizing the construction of the railroad of the plaintiffs (in the first action), notwithstanding the objections of the governor by the necessary vote of two-thirds of the members present (*Const. art.* 4, § 9), appears from the statute book (*Laws of* 1860, *ch.* 512). The constitutionality of the act, or one entirely analogous, was fully sustained by the court of appeals in *The People agt. Kerr* (27 *N. Y. Rep.* 188).

II. The franchises thus conferred, are by the act expressly made assignable without limitation as to the assignee (*Bank of Middlebury agt. Edgerton*, 30 *Ver.* 182), and the plaintiffs having been incorporated under the general railroad act, for the purpose of operating a railroad over the same routes, became and are the assignees of the rights and privileges thereby conferred, and had for a year before suit brought, been exercising these franchises and running their cars below Fourteenth street. Each and every of the city railroads in the city of New York (not including the Harlem and Hud-

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son), are incorporated under the general railroad act, to exercise franchises granted private individuals, which are held and enjoyed by the corporations thus formed, as assignees of the private grantees. The regularity of such an incorporation cannot be collaterally questioned (*Buffalo and Albany R. R. Co. agt. Cary*, 26 N. Y. 77).

The objection of the defendants, that no consent of the corporation of the city of New York was ever given to the construction of this railroad, was taken in the *New York and Harlem Railroad Co. agt. The Forty-second and Grand street Ferry Co.*, under precisely similar circumstances, and overruled. (See opinion of General Term, BARNARD, J. delivering opinion of majority of the Court in N. Y. Transcript, June 27th, 1864.)

(a) It was there held :

1. That the New York and Harlem Railroad Company, and the other parties to these controversies (who all stand in precisely similar situation as that company did in that case), did not stand in a condition to raise the objection ; that the party whose assent is necessary, is the only party who can take advantage of the want, except where the want of it has the effect of making a corporation exceed its powers, in which excepted case the attorney general can alone take proceedings for such usurpation, since the want of such consent works no private injury to the corporation, or to the individual owners of property or to tax payers, under decision in *The People agt. Kerr*. (And see *Drake agt. Hudson River Railroad Co.* 7 Barb. 508, 558.)

2. That all control of the corporation of New York over city railroads to be constructed in New York, was abrogated by the act of 1860, chapter 10, and it was unnecessary to procure their consent, as had been provided in the general railroad act (§ 28, sub. 5).

3. That the Dry Dock, East Broadway and Battery Railroad Company (occupying precisely the situation of the Forty-second and Grand street Ferry Railroad Company) "stand in the same position as if the legislature had granted the right to them, for the legislature granted it to certain

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persons and their assigns, and the defendants are the assignees."

(b) The prohibition in the 4th section of the act of April 17th, 1860, chapter 512, against the mayor, &c., giving assent to, or allowing any company claiming to derive authority under the general railroad act, "to construct any railroad in or upon any or either of said streets or avenues, and from doing any other act to hinder, delay or obstruct the construction or operation of the railroad as herein authorized," evidently has relation exclusively to any other railroad, the authority to construct which was derived exclusively under that act, as distinguished from the railroad authorized by this act.

The plaintiffs (in the first suit) having the authority of the act of 1860, have no occasion to appeal to any consent of the common council to give effect to their statutory powers, nor do they rely upon any powers conferred by the general railroad act, except for their mere corporate capacity.

(c) Their corporate powers and ownership of the railroad, authorized by chapter 512 of the laws of 1860, are fully recognized and affirmed by chapters 866, 868, 883, of the laws of 1866.

III. The plaintiffs (in first suit) having full authority to construct their railroad from First avenue "through and along Thirty-fourth street, with a double track to Avenue A," had a perfect right to lay their tracks in the manner described in the pleadings and affidavits. They did not run upon any railroad track previously laid by the New York and Harlem Railroad Company. They had no reason to abstain from doing what the law allowed to them to do, because they might have anticipated that that company would in time desire to occupy the same location. Whatever rights or benefits might accrue from prior occupation, they were entitled to secure to themselves. "*Prior est tempore, potior est jure.*" If it be assumed that the Harlem company had a right to extend their tracks further east, from the course they had previously pursued in monopolizing the main portion of Thirty-fourth street for fifty feet east of

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First avenue, these plaintiffs had no reason to expect from them any courtesy or forbearance in pursuing a like course in regard to the rest of the street wherever they choose to extend their tracks.

It was to this monopolizing act that Mr. Richardson referred when he made use of the common expression that "he would show them a trick worth two of that." While it is conceded that if the New York and Harlem Railroad Company rightfully extend their track further east, the doing so could not be justly designated a "trick," neither can the exercise by the Dry Dock Company of a similar lawful right, be so stigmatized.

IV. The New York and Harlem Railroad Company have no right to extend their road east of the original high water mark on the East river, which was west of First avenue.

1. The act of 1849, under which they (on obtaining the designation of the route and the permission of the common council) were authorized to extend their track "to the East river," made the margin of the river at high water mark, as it then existed west of First avenue, the boundary line and extreme point of extension.

It is the general rule that grants bounded by tide water, only extend to high water mark. (*Halsey* agt. *McCormick*, 3 *Kern*. 297; *Lansing* agt. *Smith*, 4 *Wend*. 29; *Canal Com.* agt. *People*, 3 *Wend*. 443; *Loundes* agt. *Dickinson*, 34 *Barb*. 586; *Gould* agt. *H. R. R. Co.* 2 *Seld*. 522; *Furman* agt. *Mayor, &c. of N. Y.* 5 *Seld*. 567.)

The whole river included within high water mark on each side, was a public highway, and the act evinces no intention on the part of the legislature to relinquish any of the public rights in the river bed to the New York and Harlem Railroad Company. The pretensions they make would justify the claim to construct a dock or wharf out into the navigable waters.

No such intention can be inferred, and the rule of construction negatives it. (*Keen* agt. *Stetson*, 5 *Pick*. 492; *Gould* agt. *H. R. R. Co.* 12 *Barb*. 616; *S. C.* 2 *Seld*. 522.)

2. The permission given them by the common council was

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upon condition that they should only act under the direction of the street commissioner (*page 7, of Case in first suit*). No such obedience to his authority, or action under his superintendence is pretended. This condition precedent ought also to have been literally complied with. (4 *Kent's Com.* 125; 1 *Greenl. Cruise*, 481; *Vanhorne* agt. *Dorraine*, 2 *Dall.* 317.)

V. If the New York and Harlem Railroad Company had any right to extend their railway beyond the point designated by the act of 1849 (to wit, the then existing margin of the East river), and to follow the accretions of the shore or change in the margin of the river, their right was subservient to that which had been conferred upon the grantees, and these plaintiffs, their assignees of the franchises granted by the act of 1860, chapter 512.

1. These plaintiffs were prior in grant.

(a) Although the act of 1849 (*chap. 75*), authorized the Harlem Company to construct a branch to the East river at such point as might be designated or permitted by the corporation of the city of New York, that authority was inchoate and without legal existence until performance of the condition precedent. Until such designation and permission had been made and given by the corporation, which did not occur till March 8th, 1864, the right or interest could not be "claimed or vest." (4 *Kent's Com.* 125; 1 *Greenl. Cruise*, 481; 2 *Dall.* 317.)

(b) The legislature had previously by the act of 1860 (*chap. 512*), specifically granted this right of location for railroad purposes in this part of Thirty-fourth street which is now held and owned by the plaintiffs (in the first suit), and the right was first exercised by them.

2. By express repeal of any existing rights of the New York and Harlem Railroad Company, in conflict with those conferred by the act of 1860.

Any rights of that company, conferred by charter or by the act of 1849, were subject "to alteration, modification and repeal." (*Const. art. 8, § 1*; *Act of Incorporation, chap. 262, Laws of 1831*; 1 *R. S.* 600; 8 *Barb.* 358; 14 *Id.* 559.)

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So far as these rights of location of railroad tracks in this part of Thirty-fourth street were concerned, the 4th section of the act of 1860 expressly repealed the ambulatory privilege of location conferred by the act of 1849, and all rights of that company, inconsistent or irreconcilable with the grant of 1860. (*Moore* agt. *Westervelt*, 3 *Sandf.* 765; *Livingston* agt. *Harris*, 11 *Wend.* 329; *Laws of 1860*, p. 1041.)

3. Effect can only be given by the court to the manifest intention of the legislature, as expressed by the act of 1860, by protecting the plaintiffs (in the first suit) in "constructing, maintaining and operating" their road over the route in question, as against all others; and if, as defendants allege (*page 16*); "there was no room for more than one set of double tracks," or (*page 17*) "it was utterly impossible to locate a railroad to the ferry in any other place than the location selected," the act of the common council, if designed to allow the privilege claimed, or to interfere with the existing rights of the plaintiffs (in first suit) as then possessed, was little less than a fraud.

Judge MILLER has entirely misapprehended the relative rights of the parties in the *locus in quo*, and given a preference to the wrong doer.

VI. The pretensions of James M. Waterbury and the East River Ferry Company, to any right of possession or ownership in the bed of Thirty-fourth street east of First avenue, or to an injunction restraining these plaintiffs from exercising their franchises over the street, as granted by the legislature, are wholly untenable.

1. The corporation of New York never had any title to any part of the premises claimed, beyond four hundred feet from high water mark (*Chap 58, Laws of 1826*).

2. The whole space in Thirty-fourth street east of First avenue, in extension of the lines of Thirty-fourth street, west of First avenue to Avenue A, had been dedicated by the corporation, and adopted by the legislature, as and for a public street.

(a) The title of the corporation of the city in the land conveyed them by the act of 1827, chapter 58, and which

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they retained therein after the deed of the Farmers' Loan and Trust Company, was held merely *publici juris*, and subject to the direct action of the legislature. (*The Mayor* agt. *Scott*, 1 *Caines*, 543; *People* agt. *Kerr*, 27 N. Y. 188; *Darlington* agt. *The Mayor, &c. of New York*, 31 N. Y. 164.)

(b) The act of thus laying it out as a public street, was within their statutory powers. (*Laws of 1787, chap. 61, § 2* [*Davies' Laws N. Y. p. 381*]; *Act of April 3, 1798, §§ 1, 2.*)

(c) Even if private owners, their acts amounted to a dedication of Thirty-fourth street east of First avenue, as a public street, and they could not obstruct the public passage to the water. (*See deed to the Farmers' Loan and Trust Company; Matter of Thirty-ninth street*, 1 *Hill*, 191.)

The street by operation of law was extended to the water (*People* agt. *Lambier*, 5 *Denio*, 9).

(d) Its use by the public as a public highway is uncontroverted, and its recognition and adoption as a public street, is complete in the statute of 1860, chapter 512.

2. The Farmers' Loan and Trust Company took no interest or title in the street under their deed from the corporation, which expressly limited the premises granted by the sides of the street (*Wetmore* agt. *Law*, 34 *Barb.* 515).

3. James M. Waterbury and the East River Ferry Company, the plaintiffs in the second suit claiming under them, have no rights in Thirty-fourth street, which are the subject of protection by injunction.

(a) Although they together claim to own the block south of Thirty-fourth street, and one hundred feet square on the south-east corner of the block north of Thirty-fourth street by no rule of apportionment of the covenant, were they bound to "fill in, regulate or grade" Thirty-fourth street beyond the middle of the street, nor can either be held to any obligation or duty as to any portion of the north half of the street except in front of the exterior, one hundred feet adjoining the bulkhead line far east of the part of the street on which these plaintiffs (in first suit) have laid their road.

(b) They cannot appear to assert the rights of the corpo-

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ration of the city of New York. (*See opinion in N. Y. and H. R. R. Co. agt. The Forty-second and Grand street Ferry R. R. Co. N. Y. Transcript, June 27, 1864.*)

(c) Neither of them (except Waterbury, as to about one hundred feet on the north-west corner of the block south of Thirty-fourth street) had any title. Beyond that, the premises claimed lay outside of the four hundred feet from low water mark, as granted by chapter 58, of laws of 1826, and belong to the state. (*See map on scale 100 feet to inch.*)

(d) They have no property or private rights in Thirty-fourth street. They were at most subject to the duty of filling, regulating and grading the street when specially notified and required. They were not tenants (by any kind of title) of any portion of the street. They were not in any sense, in possession of, or even squatters on any portion of the street east of First avenue, on which these plaintiffs had laid their railroad; it was uninclosed, and thrown open to public use, and has been ever since used for public passage, and they had no peculiar or exclusive possession or control over it.

(e) No requisition had been made on them by the corporation to fill in the street, so that the time prescribed by the covenant in the deed to the Farmers' Loan and Trust Company had begun to run, and no danger of a forfeiture could be apprehended, or was alleged. They had been over a year engaged in filling in this street, it is to be presumed for their own gain, in pretending to allow deposits of earth upon it; but their claim to an indefinite, or any exclusive possession of the street for progressing in this work of filling in, regulating and grading it, or constructing a sewer in it at their convenience and pleasure, or "until the city authorities shall fix and determine the grade line," is preposterous. Even if they were interfered with, this constitutes no trespass or taking of private property, whatever might be the obligation resting on the grantees of the corporation, under the deed of January 29th, 1847.

(f) But instead of acting under and in compliance with the covenant of the deed under which they claimed, their

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acts were in direct violation of it (*Case, second suit, fol. 99, § 116*).

(*g*) Such interference with the execution of the condition subsequent, as might follow from executing the enactments of the statute of 1860, authorizing the laying and constructing of the railroad of these plaintiffs (in the first suit), furnished a full justification *pro tanto*, for any breach of these covenants, to the extent occasioned by carrying out those provisions. (*People agt. Manning, 8 Cow. 297; Whitney agt. Spencer, 4 Cow. 39; Carpenter agt. Stevens, 12 Wend. 589; People agt. Bartlett, 3 Hill, 570.*)

(*h*) The statutory powers conferred upon the plaintiffs (in the first suit) to construct a railroad and exercise a public franchise over the street, and the repeal of all inconsistent acts, overrode all privileges or duties the corporation might have allowed to or prescribed for private persons in the streets, in derogation of the rights thus conferred by the legislature.

(*i*) They had no right in the street as against these plaintiffs, which ought to be protected by injunction, and no ground for interference by that process is shown. The act complained of, even if unjustified by the act of 1860, was at most a pure trespass. (*Hart agt. The Mayor, &c. 9 Wend. 580; Jerome agt. Ross, 7 Johns. R. 315.*)

(*j*) No insolvency of the defendants was alleged, and no reason for invoking the peculiar jurisdiction of a court of equity was shown or established.

VII. The right of the plaintiffs (in the first suit) "to construct, maintain and operate," their railroad, in and through Thirty-fourth street, in the manner prescribed by the act of 1860, chapter 512, and of exercising the franchise as thereby authorized, having been wrongfully interfered with, and their possession interrupted and usurped by the defendants in the first suit, a case is presented affecting property of a peculiar character and value, the very substance and usefulness of which is affected by acts tending to its destruction in the only character in which it can be enjoyed; for this no due recompense could be made, and

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the case called for the interposition of the court by injunction in their favor. (*President, &c. of N. and C. Turnpike Co. agt. Miller*, 5 Johns. Ch. 101; *Hud. and Del. Canal Co. agt. N. Y. and E. R. R. Co.* 9 Paige, 323; *Livingston agt. Van Ingen*, 9 Johns. R. 507.)

VIII. The orders in each of these cases should be reversed with costs; the injunction in the first suit should be continued as prayed for, and the injunction in the second suit should be dissolved.

A. J. VANDERPOEL, *counsel for ferry company and Oliver Charlick.*

The same facts from which the parties seek to draw the legal conclusions for which they respectively contend appear in each of the causes.

If the injunction asked for in the first entitled suit is granted, it follows as a necessary consequence that the injunction asked for as against the ferry company and Mr. Charlick, in the second entitled suit, must be denied.

The point insisted upon on behalf of the ferry company and Mr. Waterbury, is that in the present condition of things, neither of the railroad companies have any right to enter and lay down their rails, and run cars over the disputed territory.

I. The ferry company and Mr. Waterbury, are lawfully in possession of the space one hundred feet wide, extending easterly from First avenue to bulkhead line.

They are engaged in filling the land, constructing a sewer by and under direction of the Croton Aqueduct Department, and preparing to grade and pave the space, so soon as the city authorities shall fix and determine the grade lines which the ferry company and Mr. Waterbury must conform to when established.

II. While the work is in progress, the ferry company and Mr. Waterbury are entitled to the possession and control of the premises, and an interference by either of the railroad companies, while that possession and control continues, can-

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not find a sanction or apology in any act of the legislature or resolution of the common council.

The zeal of the railroad companies in the struggle for priority of location, has blinded them to the rights of the city, and its grantees and covenantees. Neither company would have dreamed of asserting a right to enter and lay down its rails in the present condition of the land, except for the knowledge that the occupation by the one company will necessarily exclude the other, if any regard is paid to the rights and franchise of the ferry company secured to it by the lease from the city.

III. It probably was the design of the mayor, aldermen and commonalty, when making the contract with the Farmers' Loan and Trust Company, to dedicate the space of one hundred feet wide to the purposes of a public street, when the same was filled in and regulated and paved. It was no part of the contract, however, that while the work was in progress the contractor should be subjected to an interference by or on the part of the public generally, or by a railroad company subjecting it to its use, thus largely increasing the expense of the work, and the length of time requisite for its performance. The time when the dedication to the public use should take effect, so far as to give the public a positive right of use and enjoyment, was one in which the grantees had a large pecuniary interest.

Until adapted for public use as a street, and the grantees were released from their covenant to prepare it for a street, avenue or wharf, the question of dedication was one in which only the corporation and its grantees had an interest. Any grantee or sub-grantee could insist that the corporation should be held to its agreement to make it a street.

As it now stands, it is no more a public street than if the agreement had been that after ten years from the date of the deed, the corporation would throw open this land for a street. It could not be contended that before the ten years elapsed, it was competent for the public to assume the use.

The mere mapping out a street in the city of New York, does not give the public a right to enter upon and use it.

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The map under the act of 1807, extended Eleventh street from Broadway to Fourth avenue. But the public had no right as against the owner, to enter upon it and use it until compensation should be made to the owners of the land, and before an actual dedication of it; or in other words, a right to it by user had been acquired by the public, the legislature in 1845 closed it.

IV. Assuming that the act of April 3d, 1798 (*Laws of 1798*, p. —), is in force, as contended for by the counsel for the Dry Dock Railroad Company, which allows and empowers the mayor, aldermen and commonalty, to extend streets over the lands reclaimed from the rivers, it cannot aid the railroad companies in their claim that the space at the foot of Thirty-fourth street east of First avenue, has become a public street, for there is no pretense that as to this land the mayor, &c., have acted under that statute. They have not attempted to exercise any of the powers conferred by that act—but their deed and contract is to be judged as it would be if executed by a private individual.

V. The fact that the grant under which the Dry Dock Railroad Company claim to lay down their road over this space, authorizes them to go through Thirty-fourth street to Avenue A, and down Avenue A to Fourteenth street, may be of interest as an illustration of reckless legislation, but gives them no power to enter upon the premises in question.

There are no such points known to the law as Thirty-fourth street east of First avenue, or as Avenue A, above Twenty-fifth street, except above Fifty-second street. That part of the grant is a dead letter.

In 1807 (*Laws p. —*; *Valentine's Laws*, p. —; *Davies' Laws*, p. 431), commissioners were appointed to lay out the city of New York north of a certain line, and prepare a plan and file a map of the streets, &c., which plans section 8 declares, "shall be final and conclusive."

The work was completed, the maps were filed—and are known as "Randal's Maps."

These maps are referred to in the subsequent legislation relative to the plan of the city.

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On this map Thirty-fourth street extends to the high water mark on the East river; Avenue A extends as far north as about Fourteenth street, to the shore of the East river, (where a bay commences), and disappears for the space of a mile and a half northward, where it reappears above Fifty-second street, at the same distance easterly from First avenue (over six hundred feet), as it is below Fourteenth street. So that on the map there is nothing indicating streets by the name of Thirty-fourth street or Avenue A, through or over Kipp's Bay.

What use would be made of the land which might be reclaimed from Kipp's Bay, by filling or otherwise, was left for future determination. Instead of conveying it to the Farmers' Loan and Trust Company, the city could have covered it by a market, or built bulkheads at First avenue and run out piers. There is no warrant for the suggestion that as the waters in front of the street were filled up, streets were to be opened in continuation of those on the upland, and that the same names were to be applied.

As illustrations: On the map the commissioners designated a space between One Hundred and Sixth and One Hundred and Ninth streets, from East river to Fifth avenue, as Harlem Marsh; Avenue A, First, Second, Third and Fourth avenues, extending to the marsh on the north and on the south, but were not continued through it, and in 1837, as these lands were being reclaimed, it was found necessary to go to the legislature and obtain the passage of an act altering the plan of the city, by continuing and extending the above avenues from One Hundred and Sixth to One Hundred and Ninth street. (*Laws 1837, ch. 274, p. 291; Davies' Laws, 800; Valentine's Laws.*)

So in 1837, the map was altered by laying down thereon Thirteenth avenue. It was to be reclaimed from the waters of the North river. The legislature at the same time deemed it necessary to provide that the several cross streets, as laid out on the map or plan, should be continued from their present termination (the water's edge), on the map or plan, on their present lines to Thirteenth avenue. (*Laws 1837,*

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ch. 182, p. 166 ; *Davies' Laws*, 799 ; *Valentine's Laws*, p. —.) By the same act Eleventh avenue was continued in a direct southerly line from its termination on the map, Thirty-third street, to Nineteenth street. So our session laws have many similar acts.

These laws would be wholly unnecessary if the theory of the Dry Dock Company was correct, that the streets and avenues are by law continued over the made land, on the same lines and by the same names as those on the upland. As to Avenue A, we have a legislative enactment to the effect that it does not extend across Kipp's Bay. (*Laws of 1824*, ch. 10, p. — ; *Davies' Laws*, 656 ; *Valentine's Laws*.)

The language is, "short avenues have been laid out by the said commissioners, severally called and designated on the said map or plan, by the names of Avenue A, Avenue B, Avenue C, and Avenue D, all terminating in the waters of the East river, within a short distance of their commencement."

The act of April 27th, 1860, passed ten days after the Dry Dock Railroad grant, making it illegal to fill up lands outside of the bulkhead line, is a complete answer to the suggestion of the counsel for the Dry Dock Company, that the legislature meant to recognize certain spaces near the foot of Thirty-fourth street, as continuations of Avenue A, and Thirty-fourth street (*Laws 1860*, p. 1063).

VI. By the act of 1826, the title to all the lands four hundred feet east of low water mark, on the shore of the East river, was vested in the mayor, aldermen and commonalty. The only limitation on this title was the pre-emptive right of proprietors of land under water. It is thus apparent that it was contemplated that this land would be sold by the mayor, aldermen and commonalty. In the *Furmans*, the court of appeals affirmed the absolute ownership of the mayor, &c., to the lands under water, with the right to sell all or any part of the same, at such times and at such prices as it might deem expedient (*Furman agt. The Mayor*, 10 N. Y. 567).

VII. It would be useless to discuss the question whether

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the title which the city of New York has to property not acquired under the act of 1813 (relative to the compulsory opening of streets and avenues, or lands dedicated to public use as streets by adjoining owners), is an interest which is at all times held only subject to the will of the state legislature ; in other words, whether the city of New York owns any "private property," in the sense in which those words are used in the constitution.

This land reclaimed from the water, is private property, within the meaning of the 178th section of the act of 1813, relative to street openings. That section places the mayor, aldermen and commonalty, as to its lands which may be required for a street, or benefitted by the opening, upon the same footing as an individual owner. And when the lands of the mayor, aldermen and commonalty are taken under that statute, they hold them in trust under a new title—no power of sale remains. They are to be held as public streets forever. (*Laws 1813, vol. 2, pp. 409, 415 ; Davies' Laws, 535 ; Valentine's Laws.*)

VIII. The papers on our behalf negative, and it is not affirmed on behalf of the railroad companies, that any action has been taken to open Thirty-fourth street east of First avenue, nor Avenue A, and there is no act of the legislature which interferes with the title to these lands as granted to the city by the act of 1826.

The legislature have not said that there should be a street east of Thirty-fourth street and First avenue, nor whether, if there is to be one, it should be continued on the present lines, or should diverge to the north or south.

Suppose the Farmers' Loan Company and its grantees should now agree with the mayor, aldermen and commonalty, to exchange the one hundred feet space on the present line of Thirty-fourth street, for the adjoining one hundred feet on the south ; who could raise or interpose an objection ? Who could object to the common council giving to this space taken in exchange a name other than Thirty-fourth street ? What then would become of this right which the Dry Dock

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Railroad Company assert under their grant, to run over the one hundred feet as at present filled out?

IX. If we assume for the purpose of the argument, that this space of one hundred feet wide, is within the line upon which the railroad companies are authorized to run them, we claim that they have no right to enter upon this space of one hundred feet wide without making compensation to the city, and to the grantees who have entered into covenants to fill it up and keep it in repair.

We shall leave it to the counsel for the railroad companies to reconcile if they can the principles of the recent decisions of the court of appeals, as applied to the interest of the city, in those streets opened under the act of 1813, and those which have been acquired by grant, to be used only as such. Our case is outside of those decisions.

1. As to the right of the city to compensation. If the legislature in defining the route of these roads, had directed them to go through an engine house, or one of the houses which the city owned and leased to tenants on Chatham street, it would, we think, be pretty difficult to convince a court that compensation was not to be made for the land taken.

The Dry Dock Railroad charter, which defines the route, provides for making compensation for obtaining any real estate or interest therein, which may be required (§ 3).

Any real estate for which compensation was to be made to the mayor, aldermen, &c., under the act of 1813, when taken for a street, is real estate for which compensation must be made, within the meaning of section 3, above referred to.

The same remarks apply to the Harlem company.

The grantees of the corporation can defend their possession and right to the space one hundred feet wide, until this compensation is made. The railroad companies have no right to interfere until compensation is made to the owner.

2. The Ferry Company and Waterbury, as covenantees, have an interest in this space, for which they are entitled to compensation.

It is suggested by the counsel for the Dry Dock Company,

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that under the thirteenth section of the general railroad act (*Laws of 1850, p. 215*), that compensation is only to be made to the owner of real estate—however that may be (which we will not concede), the grant to the Dry Dock Railroad Company uses very different language: “And should any real estate, or interest therein, be required for the purpose of constructing,” &c., the act points out how that interest is to be compensated for. The same section shows how carefully the rights and interests of others were intended to be guarded—for in order to cover the doubt whether the use of the rails of another company would come under the head of an interest in real estate, express provision was made to cover it.

Our duty to fill in and our duty to repair, is a matter of private contract, while intended to attain a similar end; it is outside of the laws and principles of public taxation.

The state legislature cannot pass a law which shall make that duty more onerous, without securing to us a just and fair compensation. Whether it is to be much or little, the law has prescribed a mode for its determination.

Nor will the fact that the legislature may make it more difficult and expensive to comply with our contract, relieve us from it.

The rule is, that which the law renders impossible, need not be performed. “*Lex non cogit ad impossibilia*,” is the maxim, and the word *impossibilia*, receives a strict construction (*Broom's Leg. Max.* 181).

X. The Ferry Company is entitled to compensation for injury to its franchise. The character of its business, and the injury which it must sustain by the appropriation of the street (if it be a public street), are detailed fully in the affidavits interposed by the Ferry Company and Harlem Railroad Company.

This ferry franchise is a contract, the value of which cannot be impaired by legislative action.

XI. The railroad companies had no right to convert this space into a railroad depot.

XII. The Dry Dock, East Broadway and Battery Rail-

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road Company cannot exercise any corporate rights as assignees of the grant, as against the Ferry Company or Mr. Waterbury.

This company is organized under the general railroad act of 1850 (p. 211). This act prohibits the companies organized under that act from constructing their road upon or across any streets in any city, without the assent of the corporation of such city (*page 224, § 28, sub. 5*).

This artificial person cannot take a title or exercise a right in hostility to the act which created it (*Angel & Ames on Corporations, 82 to 86*).

XIII. These railroad companies have no right to enter upon the premises in question; the proper remedy is by injunction. They create a nuisance for which there is no legislative sanction until compensation has been made. Every entry to lay down the road, every time a car enters upon this ground, a new and distinct trespass is committed, and a new cause of action arises, for which suit can and must be brought; so often as a car passes, the employees on the lines are prevented from work, and there is an almost constant repetition of this disturbance.

It would be strange indeed, if in such a case an injunction is not the appropriate remedy.

XIV. The injunction at the suit of the Dry Dock Railroad Company, if their right on the main case could be sustained, cannot be held against Mr. Charlick.

XV. The motion to vacate the injunction granted at the suit of the Ferry Company and Mr. Waterbury, should be denied, and the injunction as granted at the suit of the Dry Dock, East Broadway and Battery Railroad Company, should be vacated. All interference on the part of the Ferry Company, and Waterbury and Charlick, with the rails of the Dry Dock Company, is denied.

C. A. RAPALLO, *counsel for New York and Harlem Railroad Company.*

I. By the act of March 6, 1849 (§ 3), the New York and Har-

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Harlem Railroad Company is authorized to construct a branch of its road from any point north of Twenty-seventh street to the East river, at such point as may be designated and permitted by the corporation of the city of New York.

By the resolution of the common council, dated March 8, 1864, the company is permitted to extend its road through Thirty-fourth street to the East river.

The right of this company to continue its track through Thirty-fourth street to the East river, is, therefore, unquestionable.

II. The filling in and extension of Thirty-fourth street beyond the point where it terminated at the time of the passage of the act of 1849, does not deprive the Harlem Company of its right to extend its tracks to the river. The act does not purport to restrict the company to the line of the river bank as it existed in 1849, but it gives a general power to extend to the river itself, and does not limit the time of making the extension. The intent is apparent that the railroad should connect with the river, and that connection is the essence of the privilege granted.

III. That part of Thirty-fourth street which lies east of First avenue, not being laid down on the commissioner's map, and not having been opened as a public street, remains the property of the corporation of New York, and its consent is sufficient to authorize the Harlem Company to lay tracks thereon, and until opened as a public street the plaintiff had no right to enter upon it without the consent of the corporation.

IV. If both companies were entitled to lay their tracks on the premises in dispute, the injunction was properly refused, for the Harlem Company had the first grant of the privilege, and it appears by the affidavits that the Harlem Company first selected the center of the proposed street as the location for its tracks.

The plaintiff, therefore, had no right to drive it from that location. (*See affidavit of W. H. Vanderbilt, fols. 48, 51, 53 ; also of Thos. J. Brown, fol. 94.*)

V. The allegation that the Harlem Company broke up

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and destroyed the tracks, &c., laid by the plaintiff, and laid rails, &c., in their place, and upon the ties of the plaintiff, is fully met and denied in the opposing affidavits; and the judge who decided the motion must be deemed to have found for the defendant on that issue. (*See affidavits of W. H. Vanderbilt, fols. 70, 71; Thos. J. Brown, fols. 98, 99, 106; W. P. Craig, fol. 109; O. Charlick, fol. 142.*)

VI. These affidavits show that the aggression was wholly on the side of the plaintiff.

VII. The plaintiff has no right to lay its tracks on the premises in dispute, and, therefore, is not entitled to question the right of the Harlem Company.

1. If the premises in dispute are to be regarded as a public street, the plaintiff by becoming incorporated under the general railroad act of 1850, has subjected itself to the prohibition contained in subdivision 5, of section 28 of that act.

2. But the premises in question are not a public street, and the authority conferred by the act of 1860 cannot be exercised until such premises are open as a public street.

3. The authority conferred by the act of 1860, is a mere right of passage through Thirty-fourth street to Avenue A, and through Avenue A. At the time of the passage of the act of 1860, neither Thirty-fourth street nor Avenue A, at the points in question had any existence, either in fact or in law. The act, therefore, could not take effect until those streets were made and thrown open to the public. Avenue A at Thirty-fourth street, is still part of the East river, and outside of the bulkhead line.

The right to make a terminus at the foot of Thirty-fourth street, is not granted by the act of 1860.

The order appealed from should be affirmed, with costs.

By the court, SUTHERLAND, J. When the Dry Dock, East Broadway and Battery Railroad Company commenced constructing and extending their tracks in and through Thirty-fourth street, or the strip of land one hundred feet wide, to a point about two hundred and seventy-seven feet easterly from the easterly side of First avenue, I understood

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from the papers in this case, that Thirty-fourth street, or the strip of land between the three easterly termini of the New York and Harlem Railroad tracks in Thirty-fourth street and the place to which the ferry house had been removed, and where it then was, had been so far filled out and graded, as to be constantly used by the public in going to and from the ferry, and for common highway purposes generally. This being so, and considering other undisputed facts and circumstances of the case, I cannot see why either of the railroad companies had not then a right as to Waterbury and the Ferry Company, to construct and extend their tracks through and over Thirty-fourth street, or the strip of land between the points last mentioned, as far easterly as the grading or the condition of the street or strip of land would permit. The legal title to the strip of land was not in Waterbury and the Ferry Company, or either, and neither had any beneficial interest in the soil thereof. Considering the then devotion of it to public use, I do not think it sufficiently appeared that the devotion of it to an additional public use, by the construction and operation of a railroad or railroads upon or through it, would appreciably injure either Waterbury or the Ferry Company, by interfering with the filling up or the grading, or the construction of the sewer, to authorize the injunction at their suit on the ground of such interference. It appears to me that the Ferry Company must be actually benefitted by the extension of either railroad, or both. Moreover, the ability of either railroad company to pay any damages that might be recovered in an action at law for any possible injury to Waterbury and the Ferry Company, or either, by or from such claimed or supposed interference, is not questioned, considering that all railroads must be deemed to be constructed and operated for public use. I do not think the injunction at their suit ought to be sustained, even if we could see that by or from such interference they might suffer some slight damage or inconvenience. I think the injunction at the suit of Waterbury and the Ferry Company,

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restraining the Railroad Company, should be vacated, with costs.

As to the question between the two railroad companies, I assume and think that before the Dry Dock, East Broadway and Battery Railroad Company actually commenced locating, constructing and extending their tracks in and through Thirty-fourth street, or the strip of land one hundred feet wide, both or either of the railroad companies had the right, as between each other, to extend their tracks easterly in or through Thirty-fourth street or the strip of land to the ferry, or as far as the grading and condition of the street or strip of land would permit. Before the Dry Dock, East Broadway and Battery Company actually commenced taking a qualified possession of the center or middle of that part of Thirty-fourth street, or the strip of land, by locating and constructing their extension, I do not see why either railroad company had not a right to make their extension through or along the center or middle of the street or strip, to the exclusion of the other from that particular location. I do not see upon what principle this court could have favored the right of either company thus to locate their extension, to the exclusion of the other, before any actual attempt at such location. But I think that the Dry Dock, East Broadway and Battery Company, by first actually taking a qualified possession of the center or middle of the street or strip of land, by locating and constructing their extension as far as they did, until interfered with by the agents or servants of the other railroad company, acquired the right to complete the construction of, and to operate their extension to the ferry, or as near to it as the condition of the street or strip, and the convenient operation of the ferry would permit, to the exclusion of the right of the other company to interfere in any way with the construction or operation of the Dry Dock, East Broadway and Battery extension, as thus located. I have carefully examined the question between the two railroad companies, and can see no other principle or ground upon which we can put our decision. I do not think that the circumstance that the New York and Harlem Railroad

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Company, or its officers or agents, intended to further extend their tracks through the center or middle of the street or strip of land, and had the ties and other materials for such extension, or the circumstance that such intended extension through the center or middle would be more convenient for them in the construction or use, because their tracks east of First avenue, which had been constructed some time before the other railroad company commenced locating and constructing their extension in the center or middle of the street or strip, ran through and terminated in the center or middle of this street or strip, did or could affect or impair the right of the Dry Dock, East Broadway and Battery Company first to actually locate and commence constructing their extension as they did.

The order in this action between the railroad companies, and in which Oliver Charlick and the Ferry Company are parties defendants, should be reversed, and the injunction which was vacated by it, restored and continued, with costs to the plaintiffs, to be paid by the New York and Harlem Railroad Company.

BARNARD, P. J., concurred.

CLERKE, J. dissenting.

SUPREME COURT.

CALVIN P. SMITH agt. WILLIAM MAY AND LEWIS SPENCER.

In an action of *tort* to recover damages brought in a justice's court, and judgment for a certain sum is rendered for the plaintiff, and the defendant appeals to the county court specifying in his notice of appeal certain objections to the recovery of the judgment, but no offer to reduce the amount is served by the plaintiff, and on a trial in the county court the plaintiff recovers a larger amount than before the justice, but not sufficient to *equal the amount of interest* on the first judgment, from the time of its recovery, the plaintiff, nevertheless, recovers a *more favorable judgment, and is entitled to costs*.

Interest not being a necessary and legal incident to a claim of *tort*, the comparison of the two judgments should not be affected by it.

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Broome General Term. Argued July, 1866. Decided November, 1866.

Before PARKER, MASON, BALCOM and BOARDMAN, Justices.

APPEAL by defendants from an order of the Otsego county court, awarding costs to the plaintiff in that court.

The plaintiff in an action to recover damages for the wrongful taking of certain personal property, obtained a judgment in a justice's court for \$149.75, June 20, 1864. The defendant appealed to the Otsego county court, stating in his notice of appeal errors in receiving and in rejecting evidence; that judgment was not warranted by evidence; that judgment is for \$100 too much; that judgment is \$75 too much, and for \$50 too much at least, and that the damages were too large and excessive. No offer was made to reduce judgment. The action was again tried in the county court August 9, 1865, and resulted in a verdict for plaintiff of \$152.46.

The defendant (appellant) procured his costs to be adjusted by the county clerk, and judgment to be entered in favor of plaintiff for said \$152.46, and in favor of defendants for their costs \$100.47, adjusted as aforesaid, and offsetting such costs against plaintiff's damages, and adjudging that plaintiff recover of defendants only the balance of \$57.99.

The plaintiff appealed to the Otsego county court, by which such judgment was set aside, and the clerk was ordered to adjust plaintiff's costs on appeal, and insert them with his damages in judgment.

The defendants thereupon appealed to this court.

DEWITT C. BATES, *for plaintiff.*

JAMES E. DEWEY, *for defendants.*

By the court, BOARDMAN, J. The cases of *Loomis* agt. *Higbee* (29 How. 232), and *Reed* agt. *Moore* (31 How. 264), decided in this district, settle the construction and effect of the notice of appeal in this action upon the question of costs. There has been a great conflict of opinions upon these ques-

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tions, but it is *res adjudicata* in this district, and must so remain until some higher authority changes the rule.

But independent of that question, the plaintiff should recover costs of this appeal. The judgment was more favorable to him, being the respondent, than the judgment in the justice's court. The action was tort, and the damages are not increased or diminished by the allowance of interest as a matter of law. The jury may or may not allow interest. It is discretionary with them. When allowed, it is not because the law gives interest as a matter of right, but simply as a mode of reaching a correct conclusion. Any other mode would be equally correct.

Interest then not being a necessary and legal incident to a claim of tort, the comparison of the two judgments should not be affected by its allowance.

I think the order appealed from should be affirmed.

BALCOM, J. This action was originally brought before a justice of the peace, for defendants wrongfully taking from plaintiff's possession, and carrying away and converting to their own use, certain personal property that belonged to the plaintiff. The plaintiff recovered a judgment against the defendants before the justice for \$149.75 damages, besides costs. The defendants appealed from the judgment to the Otsego county court. The jury in the latter court rendered a verdict in favor of the plaintiff for \$152.46 damages, for which the clerk of Otsego county entered a judgment against the defendants; but he also entered a judgment in their favor for costs against the plaintiff. The county court made an order setting aside the judgment for costs in favor of the defendants, and directed the clerk of that court to adjust the plaintiff's costs, and enter judgment in his favor for such costs. The defendants have appealed from that order of the county court to this court.

The appellants' counsel claims that the verdict of the county court was more favorable to the defendants than the judgment of the justice, because interest on that judgment from the time it was rendered, to the day the verdict in the

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county court was received, if added to the judgment, would make it larger than the verdict.

The order of the county court, awarding costs to the plaintiffs, was made the 20th day of January, 1866, and the question in the case must be decided by this court by the Code as it then existed.

The judgment for damages in the county court was \$2.71 more in favor of the plaintiff than the judgment in his favor before the justice. Hence the judgment of the county court was more favorable to the respondent and less favorable to the appellants than the judgment of the justice (*Code*, § 371).

The language of the Code, at the time the county court made the order appealed from, was, if the judgment in the appellate court be more favorable to the appellant than "the judgment" in the court below, the appellant shall recover costs; otherwise the respondents shall be entitled to costs (*Code*, § 371).

There is no provision in the Code that authorizes the county court to cast interest on the judgment of the justice and add it to such judgment, and then compare the amount with the verdict in the county court, for the purpose of determining whether the verdict be more favorable to the appellant than such judgment.

The county court can only compare the judgment of the justice, as rendered, with the recovery in the county court, in determining which party to the action should recover costs.

This court decided this very question at a general term in 1864, in *Whitney agt. Wells*. In that case the plaintiff recovered a judgment for the conversion of wood, for \$50 damages, before a justice of the peace. The defendant appealed from the judgment to the Cortland county court, where the jury rendered a verdict against him for \$50 damages. The defendant contended in the county court that he was entitled to costs, because by adding interest to the judgment of the justice, it would make it greater than the plaintiff's recovery in the county court. But the county court awarded costs to the plaintiff, and the defendant appealed to this

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court from the order allowing the former to recover costs. And this court affirmed the order of the county court.

I am unable to see any reason for overruling our decision in *Whitney* agt. *Wells*.

My conclusion is, that the order of the county court in this case, awarding costs to the plaintiff was correct, and that it should be affirmed, with costs.

PARKER and MASON, JJ., concurred.

UNITED STATES SUPREME COURT.

ROSSITER AND MIGNOT agt. HALL.

The *photographing* a copy-right engraving, is an infringement of the copy-right laws of the United States (*Act of 1831*, §§ 1, 7), and will be restrained by injunction.

United States Circuit Court, Eastern District of New York.

MOTION of plaintiffs for an injunction to restrain the defendant from making and selling photographic copies of their copyright engraving "Home of Washington." It appeared that the copyright of the engraving was secured in 1863, and that the defendant within a few months past, had made negatives of the engraving, and printed therefrom numerous copies of the engraving, and of parts thereof, of various sizes; and that this suit was brought immediately on John McClure, the publisher of the engraving, discovering the photographs in the market.

CHARLES TRACY, *for the plaintiffs,*

cited *Martin* agt. *Wright* (6 *Simons*, 297); 8 *George II*, ch. 13; 7 *George III*, ch. 38; 17 *George III*, ch. 57; *Gambert* agt. *Ball* (14 *C. B. N. S.* 306, 317, 318); *Lloyd* agt. *Ashford* (9 *Solicitor's Journal*, 253); *Curtis on Copyright*, 16; *Keene* agt. *Wheatley* (9 *Am. Law Reg.* 44, 77, 78, 80, 93); *Coryton*

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on *Patents*, 93, 94 ; *Act of Congress* 1831, ch. 16 ; *Act of Congress* 1865, ch. 126.

IRA D. WARREN, *for defendant*,

cited *Wood* agt. *Abbott* (*New York Times*, July 12, 1866) ; *Acts of* 1831 and 1865.

By the court, BENEDICT, J. This case comes before me upon a motion for an injunction to restrain the defendant from producing and selling photographs of an engraving known as "The Home of Washington." The papers read show that the engraving in question is a duly copyrighted engraving, owned by the complainants, and that the defendant, by the photographic process, has produced a negative representation of this engraving, from which he prints photographs of it in various sizes, and is disposing of the same without the consent of the complainants. This the defendant claims the right to do, upon the ground that the copyright laws do not forbid making photographs of copyrighted engravings.

The act of 1831, in the first section, declares that any person who shall invent, design, etch, engrave, work or cause to be engraved, etched or worked from his own design, any print or engraving, shall have the sole right and liberty of printing, reprinting, publishing and vending such print, cut or engraving, in whole or in part ; and in the seventh section it declares that if any person shall engrave, etch or work, sell or copy, or cause to be engraved, etched, worked, sold or copied, either on the whole, or by varying, adding to or diminishing the main design, with intent to evade the law, such offender shall forfeit the plate on which such engraving, cut or print, shall be copied, and shall further forfeit one dollar for every sheet of such print, cut or engraving, which may be found in his possession.

The argument of the defendant is, that the exclusive privilege given by the first section of the act, does not include that of photographing the copyrighted engraving, because

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that is not a "printing or reprinting," and that the general words of the seventh section cannot be held to forbid in others what has not been exclusively reserved to the author by the words of the first section; and further, that photographing could not have been within the intent of the law-maker, as the art of photography had not been discovered when the act was passed. In support of such construction the decision of Judge SHIPMAN in the case of *Wood* agt. *Abbott* is cited.

I cannot agree to the construction of the act which he contends for. In my opinion sections one and seven should be read together; and so taken, the words used disclose a clear intent to protect a copyrighted work from such a mode of duplication as is practiced by the defendant. Section seven provides that any person who shall engrave, etch or work, or sell or copy the engraving, shall be an offender. The word *copy*, is a general term added to the more specific terms before used, for the very purpose of covering methods of reproduction not included in the words engrave, etch or work, and if it covers anything, should cover the photographic method, which more nearly than any other, produces a perfect copy. This construction of the American act is sustained by the construction given by the English courts to the British act, which contains the word *copy*, used in a similar connection. Hence in *Gambtel* agt. *Ball* (14 C. B. N. S. 306), where the question was whether the copyright of the engraving of Rosa Bonheur's "Horse Fair," was infringed by photographing it. EARL, C. J., says: "Is a representation of the print by photography a manner of copying? To that I answer in the affirmative." And the three other judges express the same opinion.

Indeed, to hold otherwise would work a substantial repeal of the copyright laws in many cases. For not only engravings, but books may be reproduced by the photographer, and under the construction claimed by this defendant, authors and publishers would be in no way protected against such reproduction of their works, while the art has been carried to such perfection that the photographic copies of cer-

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tain classes of engravings, which can be produced at a trifling cost, are, for the purpose of trade, nearly or quite equal to originals. It needs but an allusion to the amendment to the copyright law of 1831, passed in 1865, to dispel any doubt as to the proper construction of the act. This amendment was passed in order to protect original photographs, which were supposed not to be embraced by the words print, cut or engraving, used in the act of 1831. In order to accomplish that, it simply provides that the provisions of the act of 1831 "shall extend to and include photographs and the negatives thereof, which shall hereafter be made, and shall inure to the benefit of the authors of the same, in the same manner, and to the same extent, and upon the same conditions, as to the authors of prints and engravings." But it does not add the word photograph, to the words used in the seventh section. If, then, the word copy, does not cover the photographic process, photographs can with impunity be reproduced by the only method ever likely to be resorted to for the purpose, and the amendment gives them no protection at all. The construction I have given to the act of 1831, is necessary to render of any beneficial effect the amendment of 1865.

This conclusion is simply consistent with the construction given to the act of 1831, in the decision of Judge SHIPMAN, cited by the defendant. What Judge SHIPMAN decided in that case was, that previous to the amendment of 1865 a photograph could not be the subject of a copyright, as it was not a print, cut or engraving, within the meaning of the first section of the act of 1831. The learned judge did not decide or discuss the question whether the word copy, in the seventh section, includes photographic copies, which is the question here. Another point taken by the defendant should also be noticed, which is that the complainants' engraving did not have upon it the information that it was a copyright, required by the fifth section "to be impressed on the face thereof."

It appears that the usual legal memorandum of copyright was in this case in engraved letters placed some three inches

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below the picture itself, and printed with the picture from the plate. The affidavit of Mr. Knoedler shows that the notice would be seen in the margin of the print when properly framed, and that it was placed in the usual position.

The defendant claims that the words of the act "impressed on the face thereof," require the notice to be placed on the picture itself, instead of on the margin. But I think that when the required notice is plainly engraved on the plate from which the print is taken, within the line of a reasonable margin, and where it would not be covered when properly framed, it is impressed on the face within the meaning of the act.

It seems, therefore, quite clear that the defendant is infringing upon the complainants' copyright, and I must grant the motion for an injunction to restrain him.

NEW YORK COMMON PLEAS.

CHARLES JOHNSON AND JAMES LOWNSBERRY agt. WILLIAM FLORENCE, JR.

Where a defendant is *arrested* for fraudulent representations in contracting the debt upon which the action is brought in the N. Y. district court, on being brought before the justice upon the warrant, he may read *counter affidavits* to those of the plaintiff, and move thereon to *discharge the arrest*. But this must be done before *issue joined*.

*New York Common Pleas, General Term, December, 1866.
Before DALY, BRADY and CARDOZO, Justices.*

THIS was an action commenced in a district court by the granting of a warrant for the defendant's arrest, upon the ground of fraud in contracting a bill of \$233.75, for the use of certain coaches, horses and a wagon, hired by the defendant from plaintiff's stable. The defendant on being brought before the justice, proposed to read certain affidavits explaining the representations made, and showing them to be true. The justice refused to allow the defendant to read such affidavits, on the ground that he had no power to hear them,

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and rendered judgment on proof of the plaintiff's claim, for the amount claimed, from which judgment the defendant appealed, upon the ground that the justice erred in refusing to receive such affidavits on behalf of the defendants.

C. A. HENRIQUES, *appellant's attorney.*

DAVID MCADAM, *respondent's attorney.*

By the court, DALY, F. J. The defendant was arrested upon a warrant founded upon affidavits alleging that the defendant made certain representations which induced the plaintiffs to let him on hire, coaches, horses and a wagon, from time to time, until the defendant ran up a bill of \$233.75, which representations are alleged to have been false, and to have been made with a fraudulent intent. When the defendant was brought before the justice he offered to read a number of affidavits to show that the representations made by him were strictly true, but the justice refused to hear them, upon the ground that he had no authority. The arrest in this case was made under subdivision 3, of section 16, of the act of 1857, in relation to district courts, for fraudulently contracting the debt for which the action was brought. The right to arrest in such a case does not arise from the nature of the action, for the defendant may be liable for the debt but not liable to arrest, which is a collateral remedy wholly independent of the cause of action. If liable to arrest, the defendant must give security for his appearance, or remain in custody until the action is tried, and if judgment is rendered against him, and if sufficient property cannot be found to satisfy the execution, the defendant is committed to jail until he pays the judgment, or is discharged according to law. The warrant issues upon the affidavit of the plaintiff and of another person, proving to the satisfaction of the justice the facts upon which the application is founded, and if the affidavits are defective, if sufficient does not appear upon the face of them to authorize the issuing of a warrant, the defendant upon being brought before the justice, and before pleading, may move to set the proceedings aside as irregular.

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(*Dewey* agt. *Greene*, 4 *Denio*, 94; *Miller* agt. *Brinckerhoff*, *Id.* 118.) If the affidavits are sufficient upon their face, then the defendant may move upon affidavits for the discharge of the warrant, for the *ex parte* affidavits are not conclusive as to the right to arrest (*Shannon* agt. *Comstock*, 21 *Wend.* 458), and if the justice upon hearing the affidavits, is satisfied that no ground existed for the arrest, he should dismiss the proceeding and discharge the defendant. (*Bennett* agt. *Ingersoll*, 24 *Wend.* 113; *Malone* agt. *Clark*, 2 *Hill*, 658.) In some cases the objection has been raised by a plea in abatement (*Swartwout* agt. *Ruddes*, 5 *Hill*, 118), but the more appropriate mode of testing the right to arrest by warrant, is by a motion to dismiss it, founded upon proof of the same nature as that upon which it is obtained; the proceeding being analogous in this respect to that which prevails under the Code (*Corwin* agt. *Freeland*, 2 *Seld.* 565), and the motion should be made before plea—for if the defendant joins issue upon the merits without raising the objection, he waives it, and admits that he was properly brought into court upon the warrant. (*Andrews* agt. *Sharp*, 1 *E. D. Smith*, 615; *Malone* agt. *Clark*, 2 *Hill*, 657.) The act of 1857 does not point out what course a defendant is to pursue who has been wrongfully arrested by a warrant, but this was also the case in the part of the non-imprisonment act relating to justices' courts, which authorized the arrest of non-residents, and the issuing of attachments, where the latter had assigned or secreted, or was about to remove his property from the county with intent to defraud, under which act the cases above cited were decided. The affidavits which the defendant offered to read, contradicted the allegation in the affidavit of the plaintiff, that the representations made by the defendant were false and fraudulent, and the justice would not hear them; and the defendant was thereby deprived of his right to move for his discharge from the arrest.

The judgment should be reversed.

BRADY, J., concurred.

CARDOZO, J. "I take no part in the decision of this appeal."

Judgment reversed.

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NEW YORK SUPERIOR COURT.

JOHN C. WALKENSHAW and another, survivors, &c., of HERMAN A. SCHLUCHER, on behalf of themselves, and all other creditors of the firm of "JOHN G. PERZEL," electing to come in, &c. agt. JOHN G. PERZEL.

Loans of money by a special partner, upon securities or otherwise, to a limited partnership, for partnership purposes, or for enlarging the means of carrying on the business, are expressly permitted by the statute. That is, such loans do not come within the statute penalty of making the partnership general.

Whenever a limited partnership is insolvent within the meaning of the statute (1 R. & 766, § 20), any creditor at large is entitled to have its affairs wound up, and its assets distributed pro rata among those of its creditors who have not obtained a specific lien.

It is essential, however, before taking away the control of the assets of a limited partnership from members of the firm on the ground of insolvency, to ascertain whether all who have an interest in their retention of such control are before the court as parties.

On the death of a special partner in a limited partnership, which is indebted to him for money loaned for the partnership business, his executors represent him in his individual claim for money loaned, and also represent him as to any interest the estate may have in carrying on the partnership.

Therefore, it is for such executors to determine, with or without the sanction of the court, whether it is most for the interest of the estate they represent, to continue the partnership, or urge their claim for money lent.

And in an action by the survivors of the special partners, and all others who may come in, &c., against the general partners to wind up the partnership on the ground of insolvency, and for a receiver, &c., the executors of the special partner should be made parties; and as they may represent conflicting interests of the testator as to carrying on the partnership business, or destroying it, and enforcing the claim of the testator for advances, they should be made defendants.

What is insolvency? It is true that "insolvency" and "inability to pay," are synonymous; but solvency does not mean ability to pay at all times, under all circumstances, and everywhere, on demand; nor does it require that a person should have in his possession the amount of money necessary to pay all claims against him. Difficulty in paying particular demands is not insolvency:

Held, that the insolvency of the partnership in this case was not so clearly made out as to warrant any interference by the court.

Special Term, October, 1866. Decided November 12, 1866.

THIS is an application for a receiver of the property of a firm whose business was heretofore carried on under the name of the defendant, whereof the deceased partner of the firm of the plaintiffs (Herman A. Schlucher) was a member, and for an injunction against the continuance of the business,

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and disposition of, or other interference with the assets of such firm. The prayer for relief in the complaint is, that the property of such firm be sold, and its debts, as established in this action, so far as the proceeds may extend, be paid rateably, and for a receiver and injunction. It was made on a sworn complaint and affidavits, and resisted on affidavits.

In the year 1865 (October), the defendant and the deceased partner of the plaintiffs (Schlucher), entered into articles of agreement under seal, whereby they formed a limited partnership for the manufacture of woolen goods in the city of New York, under the name of "John G. Perzel," to continue for five years, or until September, 1871, unless sooner dissolved, by (six months) notice given by either party to that effect.

The defendant, who was the general partner, agreed to contribute to the common stock as capital, the machinery, stock and capital, then used by him at a certain place in the city of New York (corner of Twenty-third street and First avenue), at a price to be agreed upon or determined by appraisers, and also a patent for "recovering wool from mixed fabrics." The deceased (Schlucher), who was to be the special partner, agreed to contribute a certain sum (20,000), as special capital. A certain per-centage (fifteen per cent) was to be allowed for depreciation of such machinery every year, in estimating the defendant's share of the profits. Interest was to be allowed to both parties on the amount they contributed, the defendant being entitled to three-fifths of the profits, and the rest (two-fifths) went to the special partner. The defendant was to be allowed to take the machinery at its appraised value on the termination of the partnership. It was further provided therein, that notwithstanding the death of the special partner before the time fixed therein, the capital contributed by him *should remain, and the business be conducted until the partnership terminated, for the benefit of his representatives.* Other provisions not material to the questions involved in such applications, were contained in such last agreement.

Sometime afterwards, during the same month, such firm

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agreed for a certain sum (\$50,000) to buy for its own use two pieces of land, with the appurtenances, consisting of buildings and machinery in them, in the city of Brooklyn, in William and King streets, near Van Brunt street.

On the first of November of that year, such special partner entered into an agreement under seal with such firm, to advance all the money necessary to complete such purchase and pay for such lands, taking and holding as security for his repayment, the contract and deed for such land, and giving a mortgage for such part of the purchase money as should be required. By the same agreement such firm agreed to repay such special partner such sum so advanced, on or before the termination of its partnership, and to keep such property insured, and to pay all taxes thereon, and interest of mortgages. But it was further stipulated therein, that such land should be the property of such firm.

On the fifteenth of the same month (November), the parties to such firm agreed that a certain sum (\$2,000) should be charged yearly to profit and loss, for depreciation in the value of the property so bought in Brooklyn.

The special partner, besides the sum so advanced by him on such purchase, lent in his life to such firm large sums of money, amounting in all to over *forty-five thousand dollars*, which is still unpaid. The firm of "Schlucher, Walkenshaw & Co.," composed of the plaintiffs and the deceased special partner in such limited partnership, also advanced thereto at various times between the first of November, 1865, and the beginning of last January, a certain sum (\$13,000), the balance on which (\$5,628.92), is still unpaid. The time for which the separate loans by the special partner were made, is in controversy in an action between the defendant and the executors of such partner.

In July last the special partner of such firm departed this life, leaving a last will and testament, appointing therein as executors thereof, Messrs. Poppenhausen and Von Ams, who have commenced an action in the supreme court against the defendant for the dissolution of such limited partnership. In an affidavit made by them and used on this motion, they

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state that the defendant admitted to them that the duration of the loan of forty-five thousand dollars, made by their testator, was not fixed. Other actions have been commenced for the recovery of claims against such partnership, for nearly fifty-five hundred dollars. An attachment has been issued in some, on the ground of a removal by the defendant of goods to defraud creditors. Loans were procured on other goods by the defendant. The work in the manufactory has been stopped, and insurance companies have cancelled their policies, because of the withdrawal of a watchman from the premises.

The property of such limited partnership now consists of 1st. Their manufactory and lands used therewith, which is subject to a mortgage of \$53,000. 2d. The machinery in it which cost about \$68,000. 3d. Manufactured stock and raw material on hand, and a claim for work done, estimated by the defendant at nearly \$10,700, part whereof is pledged for advances thereon. The affidavit of the executor of the deceased partner stated that such manufactory is not worth more than the incumbrances upon it; that the machinery in it will not bring more than two-thirds of its cost, and the stock on hand is only available for a like proportion, making the assets about fifty-two thousand dollars. An affidavit produced on the part of the defendant of a disinterested witness (Coleman), made the manufactory worth \$75,000, being \$22,000 of available value beyond the incumbrance; the machinery worth its full cost, or \$68,000, thereby adding \$22,000 more, above the estimate of such partners, being in all about \$45,000 more, or \$97,000. The amount of debts due by such firm, except those to Mr. Schlucher individually, are about \$24,000.

The executors of the special partner obtained an injunction against the defendant, from interfering with the partnership property, which has been dissolved with a privilege of renewal on new affidavits. An affidavit was read for the defendant of offer of large custom to the factory in question. Other facts appear in the opinion of the court.

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' IRA D. WARREN, *for plaintiffs.*

J. L. JERNEGAN, *for defendant.*

ROBERTSON, C. J. The death of the special partner (Schlucher) in the limited partnership in question, must undoubtedly have been the main cause of the embarrassment of the establishment it was designed to carry on. It is evident that on the starting such enterprise, and down to the time of his death, he made the advances he did, believing it to be profitable, and that he was amply secured. He knew that he had agreed to leave his capital in it until the end of the limited partnership, and also to give credit on his advances for the purchase of the ground on which the manufactory stood, for the same time; and yet he advanced in addition a large amount of the funds of the firm of which the plaintiffs are members, up to within a few months of his death, and they have made advances since. He does not appear to have taken any steps to collect the amount due for such advances, or while he lived to have lost confidence in the undertaking. Whether the moneys due the plaintiffs are in danger from the insolvency of such firm, is the question before me.

Merely borrowing money however much, for partnership purposes, even of a special partner, or enlarging the means of carrying on a business, does not come within the prohibition of the statute. (*N. Y. Sess. Laws 1857, ch. 414, §2, and 1858, ch. 289; 3 R. S. 5th ed. 63, § 12.*) Alterations in the names of the general partners, the *nature of the business, or capital or shares contributed* by special partners in a limited partnership, under the penalty of making it general. Loans by special partners, upon securities or otherwise, are expressly permitted. (*Laws of 1857; Id. § 3; 3 R. S. 5th ed. 64, § 17.*)

The partnership in this case, therefore, remained a limited one to the time of the death of the special partner, and if insolvent within the meaning of the statute (1 *R. S.* 766, § 20), any creditor at large is entitled to have its affairs wound up, and its assets distributed *pro rata* among those

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of its creditors who have not obtained a specific lien (*Jones agt. Lansing*, 7 *Paige's Rep.* 583).

It is essential, however, before taking away the control of the assets of a limited partnership from members of the firm on the ground of insolvency, to ascertain whether all who have an interest in their retention of such control, are before the court as parties. The estate of the deceased special partner (Mr. Schlucher), has two separate claims upon, and one interest, in the assets of such partnership. He is represented only by the plaintiffs as to his interest in the claims of the firm of which they are members, as his survivors. As to his individual claim, his executors represent him, and he is also represented by them as to any interest the estate may have in carrying on the partnership. But as the two last interests may conflict, it is for such executors to determine, with or without the sanction of the court, whether it is most for the interest of the estate they represent to continue the partnership, or urge their claim for money lent. The provision of the Revised Statutes as to suing the general partners, or their being sued alone (1 *R. S.* 766, § 14), does not apply to such an action. The words of the statute are "*in relation to the business of the partnership*," and refer merely to claims by or against them as a partnership. It would be manifestly unjust to deprive the special partner of the right of being heard on the question of breaking up the partnership. Such executors, therefore, ought to have been made parties to the action, and as they may represent conflicting interests of the testator as to carrying on the partnership business, or destroying it, and enforcing the claim of their testator for advances, they should most properly be defendants. Of course, if they decide without the sanction of the court, which policy to pursue, they may be responsible to the next of kin or legatees of their testator, for any indiscretion in the matter. There is also another strong reason why they should be made parties, irrespective of any question of insolvency. Their testator covenanted that the partnership should continue, and the capital put in by him remain in it for several

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years. Such covenants are frequently introduced in partnership articles for an enterprise of a similar kind (*Story on Part.* § 199); and in general partnerships it has been held that executors are liable to damages for withdrawal of a testator's capital, or may be compelled specifically to perform his covenant by allowing it to remain. (*Story on Part.* § 196; *Coll. on Part.* § 119; *Balman agt. Shore*, 9 *Ves. Rep.* 500; *Crawshay agt. Maule*, 1 *Stranst. Rep.* 495, 510; *Pearce agt. Chamberlain*, 2 *Ves. Rep.* 33; *Gratz agt. Bayard*, 11 *Serg. & Rawl. Rep.* 41.) But in such cases, the executor, if he received the profits as legal owner of the capital invested, might be made liable for the contract entered into by such partnership. And a mere omission to give notice of a dissent, where the executors are vested with a discretion, may make them partners (*Coll. on Part.* § 232). But the amendment of the law in 1857 (*ch.* 414, § 2), requires, in order to prevent the dissolution of a limited partnership by the death of any of the partners, not only a specification in the articles of partnership *that in such event the partnership shall continue*, but also the assent of "the heirs or legal representatives" of the partner dying. In which event it provides that the "heirs or legal representatives" of such parties "may succeed" to his partnership rights, and "continue the business," the same as if "he had remained alive." This, I apprehend, requires some positive act of assent, by heirs or legal representatives (meaning of course by heirs, as in all other cases, "next of kin" or legatees, as there may or may not be a will), and not mere silent acquiescence. Since it seems no more than right that persons subsequently dealing with the partnership should know whether the representatives of a deceased special partner elect to dissolve the partnership and become mere creditors, or carry it on. It does not appear in this case whether the executors of the special partner have or not assented. Their action in the supreme court may have been on other grounds; at all events, it seems the injunction in it was once dissolved, although liberty was given to renew.

But as the defect of parties may possibly be remediable,

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by continuing the injunction until they could be added, it becomes necessary to consider the question of insolvency. Upon this, as I have already suggested, it may be assumed that Mr. Schlucher, who was joint owner with the plaintiffs of their present claim, did not seem up to the time of his death, *nor did they in the advances they made afterwards*, suspect insolvency. A large establishment like that in question, consisting of extensive buildings and grounds, valuable machinery, materials, raw and worked up, an established name, and with prosperous business, as sworn to by Mr. Coleman, may be broken up and sold in fragments, so as to realize but little, and yet if allowed to go on may clear off its liabilities. In such case the appointment of a new trustee in the shape of a receiver in place of the defendant, who is also a trustee, and not charged directly with any such misconduct as even in the case of an ordinary partnership would authorize a dissolution, should be based only on the clearest evidence of insolvency.

It is true that "*insolvency*," and "*inability to pay*," are synonymous, but solvency does not mean ability to pay at all times, under all circumstances, and everywhere on demand, nor does it require that a person should have in his possession the amount of money necessary to pay all claims against him. Difficulty in paying particular demands is not insolvency (*Cutler agt. Sanger*, 2 H. J. R. 467).

The definition in *Herrick agt. Borst* (4 Hill's Rep. 650), that *solvent* means one who has "his property in such a situation that all his debts may be collected out of it by legal process," is much more exact. Even if this perhaps might on a strict construction, require the court to determine the problem whether within the time of notifying a sale on execution, the money could not be raised on such property, by sale or otherwise. The evidence in this case falls short of it. In this case, if the partnership can be continued, if not insolvent, the claims of Mr. Schlucher's estate are not due, except \$45,000, until 1870; and there are only \$24,400 more, including those of the plaintiffs, who may be destroying their deceased partner's interest to the extent

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of over fifty thousand dollars, to collect a claim of not six thousand. This makes a present debt of nearly seventy thousand dollars, while taking Mr. Coleman's estimate, the factory over and above the mortgage, the machinery and goods on hand, exceed in value one hundred thousand dollars. I therefore do not find the insolvency so clearly made out as to warrant any interference.

The motion to continue the injunction and for a receiver, must, therefore, be denied, with ten dollars costs, without prejudice to the plaintiffs' right to renew the motion on making the executors of Mr. Schlucher parties, and on affidavits showing insolvency more clearly, or the dissent of such executors from carrying on such partnership.

UNITED STATES SUPREME COURT.

IN THE MATTER OF THE PETITION OF A. H. GARLAND. .

Previous to the act of congress passed January 24, 1865, *attorneys and counsellors at law* were, under the second rule of the court, admitted to the bar of the supreme court of the United States, by presenting evidence to the court that they had been attorneys and counsellors at law for three previous years in the highest courts of the states to which they respectively belonged ; and that their private and professional character appeared to be fair.

On the 24th of January, 1865, congress passed a supplementary act, making the provisions of a former act passed July 2d, 1862, applicable to attorneys and counsellors at law ; by which last mentioned act they were required, before being admitted to the bar of the supreme court of the United States, to take and subscribe an additional oath ;

First. That the deponent has never voluntarily borne arms against the United States since he has been a citizen thereof ;

Second. That he has not voluntarily given aid, countenance, counsel or encouragement to persons engaged in armed hostility thereto ;

Third. That he has never sought, accepted, or attempted to exercise the functions of any office whatsoever, under any authority or pretended authority, in hostility to the United States ;

Fourth. That he has not yielded a voluntary support to any pretended government, authority, power or constitution within the United States, hostile or inimical thereto ; and

Fifth. That he will support and defend the constitution of the United States against all enemies, foreign and domestic, and will bear true faith and allegiance to the same :

Held, 1st. That this statute, except the last clause, which is promissory only, is

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directed against parties who have offended in any of the particulars embraced by the above clauses, and its object is to exclude them from the profession of the law, or at least from its practice in the courts of the United States.

2d. As the oath prescribed cannot be taken by these parties, the act as against them operates as a legislative decree of perpetual exclusion.

3d. An exclusion from any of the professions or any of the ordinary avocations of life for past conduct, can be regarded in no other light than as a punishment for such conduct.

4th. The exaction of the oath is the mode provided for ascertaining the parties upon whom the act is intended to operate, and instead of lessening, increases its objectionable character.

5th. All enactments of this kind partake of the nature of bills of pains and penalties, and are subject to the constitutional inhibition against the passage of bills of attainder, under which general designation they are included.

And 6th. In the exclusion which the statute adjudges, it imposes a punishment for some of the acts specified, which were not punishable, or may not have been punishable at the time they were committed ; and for all the acts it adds a *new punishment* to that then prescribed, and it is thus brought within the further inhibition of the constitution against the passage of an *ex post facto law* :

Held, further, that the effect of the pardon by the President, of the petitioner, is to relieve him from all penalties and disabilities attached to the offense committed by his participation in the rebellion, so far as that offense is concerned. He is thus placed beyond the reach of *punishment* of any kind. And it is not within the constitutional power of congress to inflict punishment beyond the reach of *executive clemency*.

From the petitioner, therefore, the oath required by the act of January 24th, 1865, cannot be exacted. The prayer of the petitioner must be granted, and the amendment to the second rule of the court, which requires the oath prescribed by the act of January 24, 1865, having been unadvisedly adopted, must be rescinded.

Washington, D. C., January Term, 1867.

Present, all the justices.

By the court, FIELD, J. On the 2d day of July, 1862, congress passed an act prescribing an oath to be taken by every person elected or appointed to any office of honor or profit under the government of the United States, either in the civil, military or naval departments of the public service, except the President of the United States, before entering upon the duties of his office, and before being entitled to its salary or other emoluments. On the 24th of January, 1865, congress passed a supplementary act, extending its provisions so as to embrace attorneys and counsellors of the courts of the United States ; which provides that after its passage no person shall be admitted as an attorney or counsellor to the bar of the supreme court, and after the 4th of

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March, 1865, to the bar of any circuit or district court of the United States or of the court of claims, or be allowed to appear and be heard by virtue of any previous admission, or any special power of attorney, unless he shall have first taken and subscribed the oath prescribed in the act of July 2, 1862. The act also provides that the oath shall be preserved among the files of the court, and if any person take it falsely, he shall be guilty of perjury, and upon conviction shall be subject to the pains and penalties of that offense. At the December term of 1860, the petitioner was admitted as an attorney and counsellor of this court, and took and subscribed the oath then required by the second rule, as it then existed. It was only requisite to the admission of attorneys and counsellors of this court, that they should have been such officers for the three previous years in the highest courts of the states to which they respectively belonged; and that their private and professional character should appear to be fair. In March, 1865, this rule was changed by the addition of a clause requiring the administration of the oath, in conformity with the act of congress. In May, 1861, the state of Arkansas, of which the petitioner was a citizen, passed an ordinance of secession, which purported to withdraw the state from the union, and afterwards, in the same year, by another ordinance, attached herself to the so-called Confederate States, and by act of the congress of that confederacy, she was received as one of its members.

The petitioner followed the state, and was one of her representatives, first in the lower house, and afterwards in the senate of the congress of that confederacy, and was a member of the senate at the time of the surrender of the confederate forces to the armies of the United States. In July, 1865, he received from the President of the United States a full pardon for all offences committed by him by participation, direct or implied, in the rebellion. He now produces this pardon, and asks permission to continue to practice as an attorney and counsellor of the court without taking the oath required by the act of January 24, 1865, and the rule of this court, which he is unable to take by reason

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of the offices he held under the Confederate government. He rests his application principally upon two grounds : first, that the act of January 24, 1865, so far as it affects his status in the court, is unconstitutional and void ; second, that if the act be constitutional, he is released from compliance with its provisions by the pardon of the President.

The oath prescribed by the act is as follows : First, that the deponent has never voluntarily borne arms against the United States since he has been a citizen thereof ; second, that he has not voluntarily given aid, countenance, counsel or encouragement, to persons engaged in armed hostility thereto ; third, that he has never sought, accepted or attempted to exercise the functions of any office whatsoever, under any authority or pretended authority, in hostility to the United States ; fourth, that he has not yielded a voluntary support to any pretended government, authority, power or constitution within the United States, hostile or inimical thereto ; fifth, that he will support and defend the constitution of the United States against all enemies, foreign and domestic, and will bear true faith and allegiance to the same. This last clause is promissory only, and requires no consideration. The questions presented for our determination, arise from the other clauses. These all relate to past acts. Some of these acts constituted, when they were committed, offenses against the criminal laws of the country, and some of them may or may not have been offenses, according to circumstances under which they were committed, and the motives of the parties. The first clause covers one form of the crime of treason, and the affiant must declare that he has not been guilty of this crime, not only during the war of rebellion, but during any period of his life since he has been a citizen. The second clause goes beyond the limits of treason, and embraces not only the giving of aid and encouragement of a treasonable nature to a public enemy, but also the giving of assistance of any kind to persons engaged in armed hostility to the United States. The third clause applies to the seeking, acceptance or exercise, not only of offices created for the purpose of more effect-

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ally carrying on hostilities, but also of any of those offices which are required in every community, whether in peace or war, for the administration of justice and the preservation of order. The fourth clause not only includes those who gave a cordial and active support to the hostile government, but also those who yielded a reluctant obedience to the existing order established without their co-operation. The statute is directed against parties who have offended in any of the particulars embraced by these clauses, and its object is to exclude them from the profession of the law, or at least from its practice in the courts of the United States. As the oath prescribed cannot be taken by these parties, the act as against them operates as a legislative decree of perpetual exclusion. An exclusion from any of the professions, or any of the ordinary avocations of life, for past conduct, can be regarded in no other light than as a punishment for such conduct. The exaction of the oath is the mode provided for ascertaining the parties upon whom the act is intended to operate, and instead of lessening, increases its objectionable character. All enactments of this kind partake of the nature of bills of pains and penalties, and are subject to the constitutional inhibition against the passage of *bills of attainder*, under which general designation they are included. In the exclusion which the statute adjudges, it imposes a punishment for some of the acts specified, which were not punishable, or may not have been punishable at the time they were committed; and for all the acts it adds a new punishment to that then prescribed, and it is thus brought within the further inhibition of the constitution against the passage of an *ex post facto* law. In the case of *Cummings agt. The State of Missouri*, just decided, we had occasion to consider at length the meaning of a *bill of attainder* and an *ex post facto* law, in the clause of the constitution forbidding their passage by the states, and it is unnecessary to repeat here what we then said. A like prohibition is contained in the constitution against enactments of this kind by congress, and the argument presented in that case against certain clauses of the constitution of Missouri, is equally applicable

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to the act of congress under consideration in this case. The profession of an attorney and counsellor is not like an office created by an act of congress, which depends for its continuance, its powers and its emoluments, on the will of its creator, and the possession of which may be burdened with any conditions not prohibited by the constitution. Attorneys and counsellors are not officers of the United States. They are not elected or appointed in the manner prescribed by the constitution for the election or appointment of such officers. They are officers of the court, admitted as such by its order, upon evidence of their possessing sufficient legal learning, and fair private character. Since the statute of *Henry IV*, it has been the practice in England, and it has always been the practice in this country to obtain this evidence by an examination of the parties. In this court, the fact of the admission of such officers in the highest court of the states to which they respectively belong, for three years preceding their application, is regarded as sufficient evidence of the possession of the requisite legal learning, and the statement of counsel moving their admission, is sufficient evidence that their private and professional character is fair. The order of admission is the judgment of the court that the parties possess the requisite qualifications as attorneys and counsellors, and are entitled to appear as such, and conduct causes therein. From its entry, the parties become officers of the court, and are responsible to it for professional misconduct. They hold their office during good behavior, and can only be deprived of it for misconduct, ascertained and declared by the judgment of the court, after opportunity to be heard has been afforded. Their admission and their exclusion are not the exercise of a mere ministerial power. The court is not in this respect the register of the edicts of any other body. It is the exercise of judicial power, and has been so held in numerous cases. It was so held by the court of appeals of New York, in the *Matter of the Application of Cooper* (see 22 N. Y. R. 67, S. C. ; 20 How. Pr. R. 1), for admission. Attorneys and counsellors, said that court, are not only officers of the court, but officers

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whose duties relate almost exclusively to proceedings of a judicial nature, and hence their appointment may with propriety be entrusted to the courts. And the latter, in performing this duty, may very justly be considered as engaged in the exercise of their appropriate judicial functions. In *ex parte Secomb*, a mandamus to the supreme court of the territory of Minnesota, to vacate an order removing an attorney and counsellor was denied by this court, on the ground that the removal was a judicial act. We are not aware of any case, said the court, where a mandamus was issued to an inferior tribunal, commanding it to reverse or annul its decision, where the decision was in its nature a judicial act, and within the scope of its jurisdiction and discretion. And in the same case, the court observed that it has been well settled by the rules and practice of common law courts, that it rests exclusively with the courts to determine who is qualified to become one of its officers as an attorney and counsellor, and for what causes he ought to be removed. The attorney and counsellor, being by the solemn judicial act of the court clothed with his office, does not hold it as a matter of grace and favor; the right which it confers upon him to appear for suitors and to argue causes, is something more than a mere indulgence, revocable at the pleasure of the court, or at the command of the legislature. It is a right of which he can only be deprived by the judgment of the court for immoral or professional delinquency. The legislature may undoubtedly prescribe qualifications for the office, with which he must conform; as it may, where it has exclusive jurisdiction, prescribe qualifications for the pursuit of any of the ordinary avocations of life. But to constitute a qualification, the condition or thing prescribed must be attainable, in theory at least, by every one. That which, from the nature of things, or the past condition or conduct of the party, cannot be attained by every citizen, does not fall within the definition of the term. To all those by whom it is unattainable, it is a disqualification which operates as a perpetual bar to the office. The question in this case is not as to the power of congress to prescribe qualifications,

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but whether that power has been exercised as a means for the infliction of punishment against the prohibition of the constitution. That this result cannot be effected indirectly by a state, under the form of creating qualifications, we have held in the case of *Cummings agt. The State of Missouri*, and the reasoning upon which that conclusion was reached, applies equally to similar action on the part of congress. These views are further strengthened by a consideration of the effect of the pardon produced by the petitioner, and the nature of the pardoning power of the President. The constitution provides that the President shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment. The power thus conferred are unlimited. With the exception stated, it extends to every offense known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the President is not subject to legislative control.

Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him, cannot be fettered by any legislative restriction. Such being the case, the inquiry arises as to the effect and operation of a pardon. On this point all the authorities concur. A pardon reaches both the punishment prescribed for the offense, and the guilt of the offender; and when the pardon is full it releases the punishment, and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he never committed the offense. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching. If granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights. It makes him, as it were, a new man, and gives him a new credit and capacity. There is only this limitation to its operation—it does not restore offices forfeited, or property or interests vested in others in consequence of the conviction and judgment.

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The pardon produced by the petitioner is a full pardon for all offenses by him committed, arising from participation, direct or implied, in the rebellion, and is subject to certain conditions, which have been complied with. The effect of this pardon is to relieve the petitioner from all penalties and disabilities attached to the offense committed by his participation in the rebellion, so far as that offense is concerned. He is thus placed beyond the reach of punishment of any kind. But to exclude him by reason of that offense from continuing in the enjoyment of a previously acquired right, is to enforce a punishment for that offense, notwithstanding the pardon.

If such exclusion can be effected by the execution of an expurgatory oath, covering the offense, the pardon may be avoided, and that accomplished indirectly which cannot be reached by direct legislation. It is not within the constitutional power of congress thus to inflict a punishment beyond the reach of executive clemency.

From the petitioner, therefore, the oath required by the act of January 24, 1865, cannot be exacted, even were that act not subject to any other objection than the one just stated.

It follows from the views expressed, that the prayer of the petitioner must be granted. The case of *R. H. Marr*, is similar in its main features to that of the petitioner, and his petition must be granted, and the amendment to the second rule of the court, which requires the oath prescribed by the act of January 24, 1865, to be taken by attorneys and counsellors, having been unadvisedly adopted, must be rescinded, and it is so ordered.

Associate Justice MILLER delivered the *dissenting* opinion in the above cases. It was hoped the effect of the circumstances under which the law was passed would soon cease, in order that the statute might be repealed or modified. All good men looked for the return of better feelings between all sections, when the reason for the law would not exist; but the question now presented involved the exclusion from offices of public trust of those who engaged to destroy the

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government by force. This could never fail to be one of profound interest. It is always delicate to say congress exercises powers not confided to it. In their action, members of congress are as much bound by oath to support the constitution, as the judges of the court.

The constitution makes ample provision for courts of justice to administer the laws and protect the rights of the citizens. Article 3, section 1, of the constitution, says the judicial power of the United States shall be vested in one supreme court, &c. Power is vested in the congress to fix the number of judges of the supreme court, fix their salaries, provide for all necessary officers, such as marshals, prosecuting attorneys, commissioners, jurors and bailiffs. By the act of 1789, commonly called the "judiciary act," it is enacted that parties may appear and manage their causes personally, or according to the rules. It is believed there is no civilized society in the world where there are not attorneys or practioners at law.

The enactment which has just been cited, recognizes the utility of this class of men. They are as essential to the working of the court as are marshals, sheriffs and other officers. As there is no instance of a court without a bar, the practice is a privilege on such conditions as the law-making power may prescribe. It is a privilege, and not an exclusive right. Every state in the union, and every civilized government on earth, have laws by which the right to practice depends upon professional skill and good moral character. The continuance of the right is made by law the continuance of these qualities. Attorneys are often deprived of the privilege, when it is discovered that they are of bad moral character. This is done by law, statutory or common, which is equally the expression of public will. Attorneys are subject to legislation, the same as judges. Congress has the power to prescribe the qualifications of attorneys, and prescribe oaths.

The act just declared unconstitutional, is nothing more than a law that attorneys shall take the same oath as other officers in civil or military life. This looks at their past and

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future conduct, and all has reference to their overthrow of the government. They are required to answer that they are not guilty of treason in the past, and will give their allegiance to the government in the future. That true and loyal attachment to the government is made the qualification of attorneys, seems to be plain.

History shows members of the legal profession are powerful in the government, as they are the moulders of public sentiment, and they aid in the construction and enforcement of the law; and from among them judges are selected. To suffer treasonable sentiments unchecked, is to let the stream be poisoned at the source. If all the attorneys in the past had rendered faithful allegiance to the government, we should have been spared the horrors of the rebellion. If this qualification is so essential to a lawyer, it cannot be denied that the law was intended to secure that position.

The majority of the court, however, do not base their decision on a mere absence of authority to enact laws on the subject under consideration, but insist that the constitution prohibits the enactment of such laws, both by congress and the states; that the present law is in the nature of an *ex post facto* law, and that the provisions of the Missouri constitution are in conflict with the constitution, for the same reason, and are, therefore, void.

First, in regard to bills of attainder, we must recur to bills of attainder passed by the British parliament, to enable us to arrive at a conclusion as to what was intended to be prohibited by the constitution. The word "attainder," is defined to be the corruption of the blood of the criminal capitally condemned, which takes place by the common law on sentence of death. The party attainted lost all power to receive or give by inheritance. This attainder or corruption of blood continued to be the law of England at the time our constitution was formed, and may be the law on condemnation of treason this day. Bills or acts of attainder declared persons attainted or blood corrupted, so as to lose heritable qualities.

Section second of the constitution declares the congress

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shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted. He then explained at some length his views on this section, showing that the framers of our constitution struck boldly at despotic machinery, by prohibiting the passage of *ex post facto* laws and bills of attainder, with the exception which the constitution provided. It remained to be seen whether the law of congress and the Missouri constitution were brought within this class of bills. It is not claimed that the act works corruption of blood. Therefore, it is not a bill of attainder; nor did he see that it contains conviction of any designated persons.

It is true that acts were passed in Great Britain, against persons whose names were unknown, but the laws leave nothing but the names of the persons to be made out, and to prove their association with the crime committed. If not so, it would be a mere *brutum fulmen*, and punishment could be visited only by proof of the guilt. No person was pointed out by the act of congress, either by name or description. It is said that the law was made to apply to those engaged in the rebellion, but this is a mistake. It is applicable to all.

The act does not declare confiscation, nor does it pronounce sentence or inflict any punishment. It leaves the party himself to determine the act of guilt, or announce and pronounce his own sentence or innocence. It designates no name or guilt, and pronounces no sentence, and inflicts no punishment; therefore, it can in no sense be called a bill of attainder.

As to its being an *ex post facto* law, and a penal statute, it will be agreed it applies to criminal causes alone, and not to civil proceedings, which affect private rights respectively. Cases were cited in support of the argument, and the argument was continued to show that the law imposed a mere oath of office. There was nothing on its face to show it imposed an additional punishment for any other act. He maintained that the purpose of congress was to require loy-

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alty as a condition to practice in the courts, and not as the majority maintain, a punishment for past offenses.

The President cannot, by pardon or otherwise, dispense with the law. The man guilty of counterfeiting, may be saved by the President from the gallows; but a lawyer cannot by him be readmitted to this bar. It remains for the legislative power to say to what extent relief shall be extended.

As to the opinion in the case of *Cummings*, pronounced to-day, Judge MILLER quoted Justice STORY, who said the whole power as to religion is left to the states, to be acted on in their own judgment; and in opposition to the views of the majority of the court, quoted an ordinance of the first municipality of New Orleans, which imposed a penalty on the priest of the Obituary chapel for performing service in the church of St. Augustine. The priest relied on the constitution of the United States to protect him; but the court replied, the constitution makes no provision to protect citizens of a state in their religious liberties. That was left to the state laws, and the case of *Pomali* was dismissed for the want of jurisdiction.

The constitution of Missouri says certain classes shall not exercise their functions unless they show their loyalty. This the majority holds to be unconstitutional, because the constitution forbids it. In this discussion he (Justice MILLER) had said nothing of the great evils inflicted on the country by the rebellion, nor of the consequent hardships, much more severe than any law.

He had merely endeavored to show what the law is, and Chief Justice CHASE, and Associate Justices SWAYNE and DAVIS, concurred in this opinion.

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SUPREME COURT.

JASON W. DUGUID and another agt. JAMES EDWARDS, JR., and another.

Factors or commission merchants, doing business in the ordinary way, that is, receiving property from the consignors from time to time, and making sales and collections in their own names, placing the proceeds to their own credit in their bank account, charging their commissions and payments made on account of the property—making remittances to and accepting and paying drafts of the consignors, are *not liable to arrest* in an action for moneys neglected to be paid over to the consignors, on sales of their property.

Such factors and commission merchants do not act in a "*fiduciary capacity*," within the meaning of the Code (§ 179, *sub. 2*), but sustain the relation of *debtor and creditor* to their consignors.

Erie Special Term, November, 1866.

MOTION to vacate order of arrest. The defendants were commission merchants, doing business in the city of Albany. The plaintiffs were manufacturers of flour in the village of Le Roy, and early in September, 1865, shipped to the defendants one hundred barrels of flour for sale. Six other shipments of one hundred barrels each, were made along at intervals, the last being received by the defendants December 4th, 1865. The defendants paid the freight and charges, and opened an account with the plaintiffs.

They made sales of the flour from time to time, charging their commissions and payments made on account of the flour, and crediting the proceeds of sales. They made remittances to the plaintiffs, and the plaintiffs drew upon them, in one instance at thirty days, and the defendants took up some of the paper of the plaintiffs payable in Albany. The defendants were doing a large business as factors or commission merchants for many other persons. Their sales of flour were generally on short credit. The sales and collections were in their own names, and the proceeds of sales of the property of the different consignors or owners, were intermingled and placed to their credit in their bank account. In short, the business was transacted by them in the mode

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usually pursued by factors or commission merchants in Albany and New York.

Some four hundred and forty-five barrels of the flour were sold in the usual way, prior to January 18th, 1866, and mostly prior to December. The defendants sent one hundred and fifty barrels to a commission house in New York, for sale, and when they failed in February, they had on hand one hundred and sixty-five barrels, which were delivered to the plaintiffs.

The net proceeds of the flour sold in Albany were \$4,011.15, of which the defendants had paid all but \$211.15.

It is alleged in the complaint that the flour was to be sold in *Albany*, and that such was the agreement between the parties.

It is also alleged that the defendants contrary to, and in violation of the agreement made, &c., in regard to the place of sale of the flour, and without the knowledge or consent of the plaintiffs, and with the intent to wrong, cheat and defraud the plaintiffs, fraudulently shipped to the city of New York, one hundred and fifty barrels of the flour, in the name and on the account, and as the property of the defendants, and that they procured an advance thereon, &c., which they applied to their own use, to the great injury and damage of the plaintiffs.

It is averred that this flour was worth \$11.50 a barrel; it is then averred that the plaintiffs, by reason of the aforesaid wrongful and fraudulent acts of the defendants, have sustained damages amounting in the whole to \$1,800, and they demand judgment for such sum, with interest, &c.

R. BALLARD, *for plaintiffs.*

C. B. SPRAGUE, *for defendants.*

MARVIN, J. The complaint is so drawn that I am in some doubt touching the intention of the pleader. That is, whether he intended to set forth two distinct causes of action, or only one cause. The first statement related to the four hundred and forty-five barrels of flour sold in Albany, the

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net proceeds of which were \$4,011.15, and of which the defendants paid \$3,800, and "retained" \$211.15, and "neglected and refused to pay the same, or any part thereof to these plaintiffs, although often requested so to do."

Then follows the statement of the sending of the one hundred and fifty barrels to New York, beginning "and these plaintiffs further allege," &c. The counsel for the plaintiffs now claims that there is but one cause of action; that it is for the avails of the flour received by the defendants, including that sent to New York, and appropriated by the defendants to their own use. In short, that the defendants being commission merchants or factors, are liable to arrest on account of any money received by them for the property of the plaintiffs, and which the defendants have not paid over, but have themselves used.

I do not think it necessary to decide here whether the complaint contains two causes of action, one on contract and the other for a tort, as it is entirely clear that the first statement relating to the \$211.15 balance, shows a cause of action on contract; and if the defendants were not subject to arrest for this cause of action, the order must be vacated, whatever view may be taken of the other statement.

The question then is, were the defendants liable to arrest for a failure to pay over the money received for the flour sold at different times, they having used the money in their business? Is the case within the second subdivision of section 179 of the Code?

The first position of the counsel for the plaintiffs is, that the facts constituting the cause of action and authorizing the arrest are the same, and that in such a case the order will not be vacated upon the merits, unless the defendants make a case that would justify a non-suit on the trial. (*Frost agt. McCarger*, 14 *How. Pr. R.* 131, and some other cases are cited.) The rule is undoubtedly sound, but the question whether the facts stated in the complaint are such as to entitle the plaintiffs to an order for arrest, must be open to examination. In *Frost agt. McCarger*, it was held that the

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facts stated in the complaint did show a cause of action, in which the defendant was liable to be arrested.

After examining the cases cited by counsel, and some others, I have come to the conclusion that the defendants were not liable to arrest under the provisions of the Code referred to. By the Code, the defendant may be arrested in an action for money received "by any factor, agent, broker or other person, in a fiduciary capacity." It is not always easy to construe and apply the general language of a statute to the ever varying facts constituting causes of action.

Is it intended by the language here used, that all factors, agents and brokers, in actions against them for money received, should be liable to arrest? Or is it intended to qualify the liability by the words "in a fiduciary capacity," and thus limit the remedy by arrest to cases of special confidence and trust? Or are we to understand by *factor*, for instance, as here specified, one who sells the property of another, and receives the pay for such other person, simply, and nothing more?

MITCHELL, J., in *Goodrich* agt. *Dunbar* (17 Barb. 644), adopts the construction last suggested. He says: "the term 'in a fiduciary capacity,' tends to show what is meant by factor, agent, broker, being one in whom a trust is reposed, such as is usually reposed in those persons in their ordinary or regular business; that is, a trust that they will sell, and immediately account for the balance, after deducting their commissions." He says that the agency to sell or collect, is the only one that the Code refers to. In the case before him, the consignee was to take charge of the ship, pay her expenses, and sell her, &c., and the court held that he was not liable to arrest; that the agency was more extensive than that contemplated by the Code; that the plaintiff intended to trust the defendant as a debtor. A factor is an agent employed to sell goods or merchandise, consigned or delivered to him for that purpose, for a compensation called *factorage* or *commission*. (*Story's Eq.* § 33; *Russ. on Fac. and Bro.* p. 1.) Strictly it is no part of the business of a factor to advance money for his principal. If he does so in

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paying freight and charges, or in advancing upon the property, he does it upon an agreement, express or implied, other than that arising from the fact that he is a factor.

In *Hall agt. King* (8 How. 298), Justice HARRIS applies the term "fiduciary capacity," to "factor, agent or broker." He held that an agent employed to collect money, assumes a special trust, and acts in a "*fiduciary capacity*," and that he is liable to arrest, if he appropriates to his own use the money collected; that the money when collected was the principals. He thought that the true criterion is to determine whether the specific moneys received, ought in good faith to have been kept and paid over to the employer, or whether the defendant upon receiving such moneys, had the right to use them as his own, holding himself accountable to his principal for the debt thus created. In the latter case he would not be liable to arrest, in the former he would.

In *Chapman agt. Forsyth* (2 How. U. S. R. 202), it was held that a factor who receives the money of his principal, is not a *fiduciary*, within the meaning of the bankrupt act of 1841. That act excepted debts which had been created in consequence of a defalcation as a public officer, or as executor, administrator, guardian or trustee, or while acting in any other *fiduciary capacity*. In this case, the defendant as a factor, had sold the cotton of the plaintiff, and had failed to pay over the proceeds. This case is in point, in principle, if we qualify "factor" by the term "*fiduciary capacity*." In this connection see *White agt. Platt* (5 Den. 269). The plaintiff placed notes in the hands of the defendant to collect, and he collected them and used the money. It was held that he acted in a *fiduciary capacity*, within the meaning of the act of congress. The case is distinguished from *Chapman agt. Forsyth*, the court remarking, "the case of a factor is, after the sale of the goods of his principal, one rather of implied than special trust. As long as the goods of his principal remain unsold in *specie*, they can be reclaimed by the principal, and will not pass to the factor's assignees in bankruptcy. But after the sale, the proceeds of the goods of his various principals pass into a general account, and it

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is never understood that the proceeds of the sales of goods belonging to each principal shall be kept especially set apart for such principal, but that the factor has permission to use such moneys as the exigencies of his business require."

These two cases show clearly the distinction between cases of special trust and cases where the obligation or liability springs out of a general business of a commercial character, in which confidence is placed, not only in the integrity of the person employed, but in his ability to respond for any damages arising from his breach of contract or duty. *See also Commonwealth agt. Stearns* (2 Met. R. 343), in which it was held that the money received by an auctioneer for goods sold by him is his own money. The court says, "from the very nature and course of proceedings in cases of sales by auctioneers and commission merchants, the money arising from the sale of the goods of one man, may be intermingled with that arising from the sale of those of another, and they often must be so intermingled, unless the principle shall be adopted that a separate place for safe keeping is to be provided for each separate employer or customer.

In my opinion, the defendants as factors, did not receive the proceeds of the flour in a *fiduciary capacity*, within the meaning of the Code. After the defendants received the money for the flour sold, the relation between them and the plaintiffs, was that of debtor and creditor, and so the plaintiffs must have understood. The defendants were much more than mere factors, adopting the strict definition of that term; and the opinion of MITCHELL, *supra*, as to the meaning of *factor*, as used in the Code. They were engaged in large commercial transactions, requiring capital, judgment, discretion and skill. They paid charges upon property consigned to them; in the present case freights and some other charges. These commercial factors or commission merchants, in Albany and New York, do the business of selling and collecting in their own names. The name of the owner of the property is seldom known. They require and employ large capitals of their own. They often make advances upon the property consigned to them for sale, and thus assume

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heavy liabilities. They keep accounts in bank in their own names, and deposit the moneys received for the property of their principals, without distinction. They keep separate accounts with each consignor, charging for all payments made on account of the property, and for all advances, and they render their accounts, and pay balances from the general fund.

The consignors often, and perhaps generally, draw upon their consignees or factors, for the proceeds of the property, or for anticipated proceeds, drawing on time, such drafts being accepted and paid by the factors. In the present case, the plaintiffs drew one bill at thirty days, addressed to the defendants. It would be very difficult, if not impossible, for factors doing much business, to keep the funds of each man's property separate from the proceeds of all other property.

Such being the course of the business of these factors or commission merchants, it follows of necessity that the relation between them and the consignors of property, is that of *debtor* and *creditor*, for all the moneys received by the factors for property sold by them, and I may add, it is better that it should be so.

Suppose in this case the defendants had sold one hundred barrels of the flour, and received \$1,000, and had placed the money in their safe, and it had been stolen or destroyed by fire, whose loss would it have been? If it was the money of the plaintiffs it would have been their loss. But no one will doubt that the defendants must sustain the loss. The reason being that the money was the money of the defendants, and not the plaintiffs. The money would not have been held by the defendants as bailors, but as debtors. (See *Commonwealth* agt. *Stearns*, *supra*, p. 349.)

In *Frost* agt. *McCarger* (*supra*), it was suggested that if the defendant lost the money, or it was stolen from him, as he claimed, this would be a good defense on the trial, he being a special agent to collect the money. I have not overlooked *Schudder* agt. *Shiells* (17 *How.* 420). This case, I think, can only be sustained upon the understanding that the plaintiff made the defendant (a commission merchant)

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in New York, his agent specially to sell the butter, and to remit to the plaintiff the money received for it. I can understand that a transaction between a consignor and a consignee, may be so special as to impose upon the latter a *fiduciary character* in the transaction. It does not appear in the case that there was more than one shipment of butter, and it does not appear that the defendant paid the freight, or any charges, or was at any expense on account of the butter. The case is decided upon the remarks of MITCHELL, J., to which I have already referred, and the court must have held that the defendant was one in whose integrity confidence was reposed, rather than in his pecuniary ability; and the court put the decision on this ground. The defendant's duty was strictly to sell and remit, and nothing more. If the case was well decided, it is not in point in the present case.

If we construe the Code as authorizing the arrest of a factor in an action for money received, without the qualification "in a fiduciary capacity," we must limit the remedy to the case of one acting simply as *factor*, as defined in the books, and it must be a case where the action will be for money received to and for the use of the plaintiff. The action is to be for money received.

It must not be a case where the course of dealing between the parties is such as to show that credits were to be given, and that advances or payments were to be made on account of the property.

The order of arrest should be vacated.

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COURT OF APPEALS.

MARTHA ERNST, Executrix, &c., of HENRY ERNST, deceased,
respondent agt. THE HUDSON RIVER RAILROAD COMPANY,
appellant.

As we have reported this case exclusively, including the first decision of the general term of the supreme court in March, 1860 (19 *How.* 205), the first decision of the court of appeals, September term, 1862 (24 *How.* 97), and the second decision of the court of appeals, March term, 1866 (*ante*, p. 61), we cheerfully publish the dissenting opinion of Judge SUTHERLAND, delivered when the case was first decided in the court of appeals (24 *How.* 97), which last opinion embraces, as we understand, all the opinions delivered in this important case.

In giving us this opinion for publication, Judge SUTHERLAND made the following statement: "The statement of facts preceding the within opinion, was drawn by me with great care, and was deemed to be impartial and accurate, and sufficiently full. If it is thought worth while to report this dissenting opinion, I want the statement of facts preceding it reported." Both are accordingly given below.—*REP.*

September Term, 1862.

THIS is an action under the statute to recover damages of the defendant for negligently causing the death of the plaintiff's testator, Henry Ernst.

The action has been twice tried. On the first trial before Mr. Justice GOULD and a jury, the plaintiff was non-suited, but a new trial was granted, on the ground that the case should have been submitted to the jury.

The second trial was before Mr. Justice HOGEBOM and a jury, at the Rensselaer circuit, in February, 1861, when a verdict was rendered for the plaintiff for \$2,500.

A motion was made for a new trial on the judge's minutes, which was denied. The defendant appealed to the general term from the judgment entered on the verdict, and from the order denying a new trial.

The general term affirmed the judgment and the order denying a new trial, and the appeal to this court is from the judgment of affirmance.

It is admitted by the pleadings, that at the time of the accident which caused the death of Henry Ernst, the defendant managed and operated the Troy and Greenbush Rail-

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road, located on the east bank of the Hudson river, extending from Troy to Greenbush ; and it appeared on the trial before Mr. Justice HOGBOOM, that at or in the village of Bath, the railroad crosses a public road or highway, leading from Sandlake, in the county of Rensselaer, through the village of Bath, to a ferry over the Hudson, called the Bath Ferry.

It further appeared, that on the morning of the 29th day of December, 1855, the decedent left his residence in Sandlake for Albany, with a pair of horses and an empty sleigh, and on arriving at Bath, stopped at Dearstyne's tavern, about one hundred and fifty feet east of the railroad track at the crossing ; that soon afterwards the decedent and one Simmons, who was with him, came out of the tavern, and Simmons proceeded on foot to the ferry to detain the boat for the decedent, who unhitched his horses, and seating himself on a board across the box of the sleigh, which was about ten inches in height, drove directly towards the boat, and that as he approached the railroad crossing, the defendant's train of cars going south, came in collision with the decedent's horses, causing his death.

Several witnesses, who it would appear were competent to judge, testified that the train was going at the time of the collision, from thirty to forty miles an hour. Several of the employees of the defendant estimated the speed at from ten to fifteen miles an hour.

Several witnesses, some eight, who were in a situation to hear, testified that the bell of the engine was not rung or the whistle blown until the moment of collision. The engineer on the train, and one or two other employees of the defendant, testified that the bell was rung and kept ringing, for a distance of eighty rods before reaching the crossing, and that the whistle was blown eighty rods before reaching the crossing.

It also appeared that ordinarily there was a flagman stationed at the crossing ; that at the time of the accident, Miller, the regular flagman, was absent, and a man by the name of Rouse, acted as temporary flagman ; that when

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Rouse saw the decedent and the train approaching the crossing, he became excited, and made motions for him to stop; that he did not waive any flag, but made the motions with his hands or arms. It appeared that Rouse had no flag.

It further appeared that there was a station house, twelve by sixteen feet in size, located east of the railroad track, and just north of the street leading to the ferry; that in going from the tavern down the street to the railroad track, the view north up the track was obstructed by trees and high ground, so that it could not be seen for a greater distance than thirty rods, until you got within about two rods of the station house; that from that point, as you proceeded on towards the station house, you could see further up the track; at one point for a distance of forty or fifty rods; that the railroad crosses the street nearly on a level; that from the railroad to the ferry, the road for teams was very steep, and that it was one hundred and sixty feet from the railroad to the ferry dock.

It also appeared that the decedent was a teamster, and frequently traveled the road, and knew about the crossing; that it was a very cold day, and he had a shawl about his neck and face; that several persons standing near the track, as they saw the decedent approaching the track halloosed to him to stop, to hold on; that Rouse and Simmons motioned to him to stop.

Hunter, who halloosed to him "hold on, there come the cars," testified, that when he saw the decedent and so halloosed to him, the cars were ten or twelve rods above the crossing; and it would appear from his testimony that the decedent was then about thirty-five feet from the railroad track, and fifteen or twenty feet from Hunter.

From the testimony of other witnesses, it would appear that the decedent was two or three rods from the track when he was halloosed and motioned to. One witness says he was in the act of driving on the track when Hunter made motions with his hands.

The witnesses did not entirely agree as to the speed with which the decedent approached the railroad. Simmons tes-

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tified, that when he heard the cars coming, he looked back and saw the decedent coming, one horse on a jump and the other on a trot. Other witnesses testified that the horses were on a trot; one witness says, on a *moderate trot*. Another witness testified, that when he first saw decedent, he was forty feet from the track, and the horses were on a walk, and walked until struck by the engine. *The hallooing and motions were differently understood by the bystanders; one thought they meant keep off, and another, come on the boat. Others did not understand the meaning at all.*

As the decedent was approaching the track, *some one on the ferry boat made signals and motions for him to come on.*

It appeared that the decedent drank spirituous liquor at three different places before he arrived at Bath, but it did not appear that he was intoxicated. It did not appear that the decedent looked either up or down the track as he approached it, or that he turned his head either way when halloosed to.

At the close of the evidence the defendant moved for a dismissal of the complaint, on the grounds that there was no proof that the death of the plaintiff's testator was caused by any wrongful act, neglect or default of the defendants, and also upon the ground that the case showed that the negligence of the decedent caused, or contributed to cause his own death.

The court denied the motion, and submitted the case to the jury, and to this the defendant excepted.

JOHN H. REYNOLDS, *for the appellant.*

R. A. PARMENTER, *for the respondent.*

SUTHERLAND, J., *dissenting.*—It is conceded in the case, that the court correctly stated to the jury the rules of law applicable to questions of negligence. The only question in the case then is, whether the court should have non-suited the plaintiff, or dismissed her complaint at the close of the evidence.

The counsel for the appellant does not ask that the judg-

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ment should be reversed on the ground that the question as to negligence on the part of the defendant, or its employees, should not have been submitted to the jury; but on the ground that the decedent was himself plainly negligent, and by his negligence caused, or contributed to cause, his own death.

There is no doubt as to the principle of law, that if the decedent by his own negligence contributed to cause his own death, that the plaintiff cannot recover, however negligent the defendant or its employees may also have been. The question then is, whether it was the province of the court or of the jury in this case, to pass upon the question of negligence on the part of the decedent. In my opinion, it was the province of the jury, and for the grounds of this opinion I refer to my opinion in the case of *Amanda Rhodes, Administratrix, &c. agt. The Buffalo and State Line Railroad Company*, decided at the last term of this court. This case never has been reported, but it seems that a portion of my dissenting opinion in the case was taken and reported as my dissenting opinion in *Wilds agt. The Hudson River Railroad Co.* (24 N. Y. R. 444, &c.), in which case I also dissented.

It may be that the supreme court thought that a verdict for the defendant, would have been more or equally satisfactory, but I do not see upon what principle that court could have granted a new trial. It could not have done so on the ground that the verdict of the jury was against the weight of the evidence as to the carelessness or negligence of the decedent. There was no material conflict in the evidence as to the facts or circumstances relating to the conduct of the decedent, or bearing on the question of carelessness on his part. There may have been a conflict between these facts or circumstances, as arguments on the question of the negligence of the decedent; that is, that some of these circumstances may have tended to show great carelessness on the part of the decedent, and others of them less carelessness, or usual care and prudence.

It appears to me, if the general term had granted a new trial in this case, it must have been solely on the ground that the

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jury had drawn the wrong conclusion from the circumstances of the case relating to the conduct of the decedent ; that they had misjudged as to the weight or force of these circumstances, as arguments on the question of the negligence of the decedent.

Now I think it was the peculiar province of the jury to judge of the weight or force of these circumstances relating to the conduct of the decedent. I do not see why the jury were not just as likely to judge rightly as to the conduct of the decedent on the occasion of the accident which caused his death, as the learned judge who presided at the trial ; no law having declared what conduct should be deemed careless or prudent on such an occasion.

I think it was the province of the jury first to determine from the evidence how the decedent did conduct ; and next, to say whether his conduct was careless or not. No law has defined or declared what shall be deemed careless or negligent conduct in approaching or crossing a railroad ; or the facts or circumstances to show negligence in approaching or crossing a railroad ; and the misfortune is, as it is not to be supposed that all the facts and circumstances of any two cases will be precisely the same, if this court should reverse this judgment and grant a new trial, its decision can never have the force of authority.

I might refer to the decision of this court in the case of *Betsey Bernhard, Administratrix, &c. agt. The Rensselaer and Saratoga Railroad Company*, made a few terms since, to show that the judgment in this case should not be reversed ; and the decision of the court in the case of *Amanda Rhodes, Administratrix, &c. agt. The Buffalo and State Line Railroad Company*, made at the last term, might with equal propriety be cited to show that the judgment in this case ought to be reversed ; but the latter decision did not reverse, and cannot be deemed to have reversed the former decision ; for the circumstances of the two cases were entirely different.

But if this court, without regard to the principles and precedents of the common law, which committed questions of conduct to the jury, should in this case assume the prov-

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ince of a jury, and undertake to judge from the evidence, whether the conduct of the decedent was careless or not, I do not see how a new trial could be granted.

It is to be presumed that the death of the decedent was caused either by his own negligence or the negligence of the employees of the defendant. It is not to be presumed that he intended to commit suicide, or to wilfully throw away his own life. It is not to be presumed that those in charge of the train intentionally and wilfully run over him. The question is : did the decedent by his own negligence, cause or contribute to the cause of his own death ?

The circumstances, that as he approached the crossing he was hallooeed to, and motioned to stop, are relied on to show that he rushed on to his own destruction—but it is easy to see, that all this halloeing, and these motions, might have misled the most prudent man under the circumstances.

What are the circumstances ? The decedent and his companion Simmons, stopped at the tavern in Bath, probably to warm themselves and take a drink, before crossing the river ; they were told that the ferry boat was about starting ; they hurried out of the tavern without drinking ; Simmons hurried down to the ferry on foot to detain the boat ; the decedent unhitched his horses, jumped into his sleigh and hurried on. What was he thinking of ? No doubt of reaching the ferry boat before it left. He sees the motions—he hears the halloeing as well as he could with the shawl about his neck and ears ; he sees Simmons motioning ; *he sees a man on the ferry boat motioning him to come on.* Is it not probable that his mind was so absorbed with the one idea, or fear, that the boat would leave before he could reach it, that he supposed all this halloeing and motioning to mean, “hurry on or the boat will leave you ?” And if he thought so—if any man of ordinary prudence might have thought so under the circumstances—if this was the theory of the conduct of the decedent, which the jury, who saw the witnesses and heard them testify, adopted ; why should this court, with nothing before them but a statement of the evidence, undertake to say that the jury misjudged ?

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There was conflicting evidence as to the rate of speed at which the train was running, and also as to whether the engine bell was rung or whistle blown, before the accident.

In looking at the question whether the motion for a non-suit should have been granted, on the ground of the negligence of the decedent, we have a right to assume that the speed of the train was the greatest speed testified to; and that neither the bell was rung nor the whistle blown, before the collision. *Who can say if the bell had been rung or the whistle blown, as required by law, that the decedent would have been misled by the hallooing and motions? or that the accident would have happened if the speed of the train had been such as is prudent at railroad crossings in a village?*

In my opinion, the judgment should be affirmed, with costs.

COURT OF APPEALS.

WILLIAM H. KENZEL, respondent agt. EDWIN R. KIRK and others, appellants.

1. Where necessaries are purchased for the use of a vessel, by its master, and where the registry contains the names of the owners, with such person as master, such owners are *prima facie* liable for supplies, in the absence of any proof qualifying such master's authority.
2. In such case it rests with the defendants to establish a defense.
3. The proof that such vessel was "run on shares," is not of itself sufficient to discharge the owners from responsibility.
4. The real question is, who by the charter party *has sole possession, command and navigation of the ship?* This is always a question of fact, depending on the peculiar circumstances of each case. In many cases "running on shares," is a method of determining the amount of the master's compensation as such.
5. The numerous decisions reported from the courts of the eastern states on this subject, are based on the principle that the general owners are not liable, because they have let the *exclusive possession, command and navigation* of the ship, not to one as agent, but for the time *as owner*. In such lettings, the doctrine of agency has no application.
6. The hirer then, in all contracts for supplies, acts for himself, and upon his own responsibility and credit.
7. In all such cases, the share of freights paid to the owners by the hirer, is to be regarded as their charter money for the use of the vessel.
8. But where the general owners say to the captain, "we will give you a gross sum per month," or "we will give you one half her gross earnings to sail her

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for us as captain, and you shall pay half of her disbursements, and find all her supplies," the owners are responsible for supplies to third persons ignorant of the arrangement, as in ordinary cases of masters purchasing supplies for vessels they command.

December 31, 1866.

THIS action was brought to recover against the general owners of a vessel, a bill of supplies furnished to the captain, who was sailing on shares.

The facts of the case are as follows: The defendants were general owners of the schooner *Moonlight*, and let her to Captain Rogers to run on shares. He was to provision, victual and man her, and to pay one-half of her disbursements, and was to receive no pay other than the half earnings. In September, 1856, after the schooner had been running some time under this arrangement, Captain Rogers took her to Elizabethport, N. J., and ordered the plaintiff who kept a store in Jersey City, to send supplies of beef, &c., to the vessel, to fit her for a voyage to Cuba, &c. The plaintiff furnished such supplies to the value of \$296.88, and he was allowed to prove under defendants' objection, that he charged the account to "*schooner Moonlight*."

There was no evidence that the plaintiff had ever before furnished supplies to the schooner, and this was the first time that he had any dealings with Captain Rogers, but he knew several of the owners, and that at least one of them boarded in Hoboken, and had an office in West street, in New York, but made no inquiry from any of them as to Captain Rogers' authority to contract for them.

The plaintiff proved he had no knowledge that the captain was running her on shares.

It was further proven that the vessel had been originally built for Rogers to command her, under an understanding he was to do her business. He had been in the habit of buying supplies for the vessel in ports where the owners did not reside, for which they paid, and also of doing with the vessel as other captains did.

It also appeared that the vessel was registered in the names of the appellants as owners, with Rogers as master.

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It further appeared that the owners dismissed the master on her trip out, at Key West, and took possession of their vessel and of a portion of the stores purchased of the plaintiff, which remained on the vessel unconsumed.

The defendants moved for a dismissal of the complaint. This was denied; defendants excepted.

The judge (SUTHERLAND, J.) left the case to the jury on this charge in substance, viz: "That in the absence of any notice to the plaintiff that the vessel was let on shares, or an opportunity by reasonable caution to ascertain the facts, the case presented would be the ordinary one of the master of a vessel buying goods and necessities for a vessel."

To this charge the defendants generally excepted.

The jury found a verdict for the plaintiff of \$344.41.

The general term affirmed the judgment of the court below. (*See report in Barb. Rep. p —.*)

GEORGE F. BETTS, *for appellants.*

First. This precise case has been decided, and it is the duty of the court *stare decisis*. (*Webb agt. Pierce*, 1 *Curtis*, 104; *cited and approved* 18 *How.* 190, and 19 *How.* 30; *Stedman agt. Feidler*. 25 *Barb.* 618; *S. C. affirmed* 20 *N. Y. R.* 437; *Perry agt. Osborn*, 5 *Pick.* 422; *Cutler agt. Thurlo*, 20 *Maine*, 213; *Baker agt. Huckins*, 5 *Gray*, 596.)

Second. Plaintiff cannot recover unless the master to whom he furnished the supplies, was in fact the agent of the defendants in procuring them. (*Briggs agt. Wilkinson*, 7 *B & C.* 34; *Curling agt. Robertson*, 7 *Man. & G.* 336; *Mitchison agt. Oliver*, 5 *El. & Bl.* 419; 32 *Eng. L. and Eq. R.* 219; *Meyers agt. Willis*, 17 *Com. B.* 886; *Brodie agt. How.* 17 *Com. B.* 109; *Hackwood agt. Lyell*, 17 *Com. B.* 124; *Mackenzie agt. Perley*, 11 *Exch.* 638.)

1. The general owners are not necessarily liable. Their general ownership, at the utmost, raises a presumption that the master acted as their agent in purchasing supplies, which presumption fails upon proof that some charterer, or

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the master himself, was owner *pro hac vice*. (*Macy* agt. *Wheeler*, 3 *N. Y. R.* 231, and cases cited under first point.)

2. Such an agreement as is proven in this case, makes the master charterer and owner *pro hac vice*. (*Hallet* agt. *Columbian Ins. Co.* 8 *Johns.* 272; *Reynolds* agt. *Tappan*, 15 *Mass.* 370; *Taggard* agt. *Loring*, 16 *Mass.* 336; *Manter* agt. *Holmes*, 10 *Met.* 402; *Cutler* agt. *Windsor*, 6 *Pick.* 335; *Thompson* agt. *Snow*, 4 *Green.* 1, 264; *Sproat* agt. *Donnell*, 26 *Maine*, 185.)

Third. The want of notice to the material man, or of reasonable opportunity to ascertain by the exercise of prudence, who is owner *pro hac vice*, cannot affect the rights of the parties.

And the judge erred in this respect, in his charge to the jury.

1. None of the cases above cited, allude to such want of notice or opportunity, as the ground of a right of action.

Nor in those cases was such notice or opportunity proved as a defense. The defense was deemed perfect by the court, without such proof.

2. The following cases expressly hold that such a question is immaterial: *Brodie* agt. *Howard* (17 *C. B.* [84 *Eng. C. L. R.*] 109); *Mitcheson* agt. *Oliver* (5 *El. & Bl.* 419); *Stedman* agt. *Feidler* (25 *Barb.* 618); *affirmed on appeal* (20 *N. Y. R.* 437).

3. By the well settled principle of law, such a question is immaterial.

The case shows that no previous act of the defendants had induced plaintiff to regard Captain Rogers as their agent. It also shows, as well as the bill itself shows, that no credit was given to any particular individuals as owners, but merely to the "schooner Moonlight," and thus perhaps inferentially, to whoever was legally liable to pay her bills. And the complaint shows that the names of the general owners were unknown, some being sued as John Doe and Richard Doe.

4. It was the duty of the judge to have charged that by the evidence of the plaintiff himself, he had a reasonable

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opportunity to ascertain that the vessel was run on shares.

There being no dispute as to the facts, the law determined this to be a reasonable opportunity.

Fourth. The motion for a non-suit should have been granted.

The plaintiff had failed to make out a case, and there was no question to go to the jury.

The judge concedes in his charge that there was no question for the jury but that of notice or reasonable opportunity to ascertain whether the vessel was sailed on shares.

But it is submitted, that upon the grounds stated under the third point, that question should not have been left to the jury.

Fifth. There was error in admitting the evidence as to whom the charge was made by the plaintiff in his books.

The plaintiff is allowed here to prove an act done by himself, without instructions from the defendants, in their absence.

This is clearly irrelevant; it cannot avail to affect the defendants' rights, nor to strengthen the plaintiff's (*Cutler agt. Thurlo*, 20 *Maine*, 213).

But while immaterial, it was also calculated to influence and prejudice the jury, as it even affected the judge who delivered the opinion of the court.

Sixth. The captain had no authority to procure supplies in Jersey City, for his vessel at Elizabethport. That was not a port of necessity. The peculiarity of ordering supplies from Jersey City under such circumstances, should have put plaintiff upon inquiry as to Rogers' authority.

If such purchases be allowed, it is out of the power of owners to give such notice as the judge in his charge requires.

DENNIS McMAHON, *for respondent.*

First. The master of the ship is the confidential agent of the owners, and as such in general he appears to all the world in matters relating to the usual employment of the

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vessel, and to the means of employing her; the business of fitting out, victualing and manning the ship in ports where the owners do not reside and have no established agent, and frequently also, even in the place of their own residence. His position, therefore, furnishes presumptive evidence of authority from the owners to act for them in those cases, liable indeed to be refuted by proof that they, or some other person for them, managed the concern in any particular instance, and that this fact was known to the particular creditor, or was of such general notoriety that he may reasonably be supposed not to have been ignorant of it; and the repairs and supplies, however, must be such as a prudent owner would have ordered or assented to if present. To this extent the master has power, it is insisted, to bind the owners personally, as well in the place where they reside, as abroad. (1 *Conklin's Ad. Pr.* p. 73, 2d ed; *Abbott on Shipping*, part 2, chap. 3, §§ 2 and 4; *Ship Fortitude*, 3 Sum. 228; *Patterson agt. Chalmers*, 7 B. Monroe, 595; *The Paragon*, Ware's R. 322; *Hardy agt. Sproul*, 29 Maine [16 Shep. 258]; *Webster agt. Lechamp*, 4 Barn. & Ald. p. 352.)

This principle is held by the court of appeals in 5 *Selden* (p. 235); *Provost agt. Patchin*; *Saxton agt. Reed*; *Lalor's Supplement to Hill and Denio* (p. 323).

Second. In the case at bar, the plaintiff's proof tended to show that he sold the goods (which were necessities) at the request of the master, on the credit of the vessel. That he did not know that the vessel was run on shares. That the master who got the goods was to all appearances in charge and command of the vessel, to the same extent as other masters. That the vessel was built for him, and the master had ordered other repairs and supplies, which were paid for by the owners without their objection. No proof was introduced by the defendants that masters of such vessels usually run on shares (*Saxton agt. Reed, Lalor*, p. 330).

The learned judge below left the case to the jury on the distinction taken in *Conklin's Admiralty* (vol. 1, p. 73 2d ed.), and by all the other elementary writers. (*Rich agt. Coe*,

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Cowper, 636; *Arthur* agt. *Schooner Cassius*, 2 *Story*, pp. 81 and 94.)

The jury found for plaintiffs, and if the above authorities are good law, then the finding is conclusive. The exception taken by the defendants *was to the whole charge*, and, therefore, was too general. If any part of the charge was good the exception was pointless.

Third. The learned judge below was right in refusing to non-suit, because the motion went to the question of authority of William C. Rogers, the master, to bind the defendants for necessities for the vessel, which was one mixed of law and fact, and that a master who ran on shares had no right to bind the owners for supplies for the vessel, yet the case at bar went beyond, and showed these further and additional facts on the question of authority, viz :

(a) That the schooner *Moonlight* was built for W. C. Rogers, as commander, by the owners.

(b) That Rogers was in the habit of ordering supplies and repairs for the vessel, which the owners paid for, and without their objection.

(c) That the disbursements were to be paid equally by the owners and the master, which made it a joint concern. The case in 1 *Curtis' R.* (p. 104), seems to turn on the fact that the material man knew of the universal custom at Belfast, Maine, to let such vessel on shares. (See p. 113.) In *Reeve* agt. *Davis* (1 *Adolph & Ellis*, 312), the case of *Rich* agt. *Coe* (*Cowper's R.* p. 636), is not referred to either by the counsel or the court.

Fourth. The defendants did not explain, by evidence or otherwise, what was meant by a "running on shares." For all that appeared in the case, the master had all the independent authority of other masters. The vessel was registered with the name of Wm. C. Rogers as master. To the world, therefore, he appeared as master. (See *observations of BEARDSLEY, J. on pages 329, 330, Lalor's Sup. to Hill & Denio.*) They had let the master in the uncontrolled operation of the vessel, sent him out into the world clothed with apparent authority, and because a loss ensued by his mis-

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management, they seek to bring that consequence not on themselves, but on those who dealt with their agent in good faith, without notice of his restricted authority. We submit that it would be a subversion of well defined legal principles to say that the mere proof of running on shares, without bringing it home to the seller of the goods at the time of the sale, is to relieve them from the consequences of the master's action. Public policy and the true interests of commerce, demand that the rule herein contended for should be preserved. In *Witbeck* agt. *Schuyler* (31 *How. Pr. R.* p. 97, opinion 98 and 99), the question of authority in the agent is measured as to third parties not by what the principal actually gave the agent, but by what he allowed the agent to assume, and cites : see on this point *Bidenlac* agt. *Smith* (31 *N. Y. R.* p. 259) ; *Ship Nathaniel Hooper* (3 *Sum. R.* p. 543, and opinion 596).

Fifth. It is no objection that the vessel (the Moonlight) was not lying at Elizabethport at the time the supplies were got. (*Lalor's Sup. to Hill & Denio*, 324 ; *Provost* agt. *Patchin*, 5 *Seld.* 235 ; 7 *Price*, 592.)

She was in coterminous waters, and in the same state. She needed supplies. Were it an objection ? The defense did not raise it on a motion for non-suit, or by way of a request to charge. He stated it only as a reason why the plaintiff's charge in the books should not be introduced. It was not an objection that went to the introduction of testimony, or to its effect when introduced.

Sixth. The case of *Stedman* agt. *Feidler* (25 *Barb.* p. 612), as affirmed in 20 *N. Y. R.*, 437, is not unfavorable to the respondent's case. On page 447 (20 *N. Y. R.*), it will be seen that the case was affirmed on the second ground stated on page 446, viz : that the authority for the part owner to bind his co-owner's (Hart's) estate for supplies, presumable because he was co-owner, was revoked by the death of Hart, and that Hart's administrator had no right to incur new responsibilities or liabilities in the running of the vessel after the death of his intestate, and thereby to bind the estate he represented. This was the only point really settled by the

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court, which did not pass on the particular point claimed to be decided in the case in the general term (25 *Barb.* 612); but Judge ALLEN, who delivered the opinion in the court of appeals, on page 442 (20 *N. Y. R.*), speaks of cases analogous to the one now under consideration, and in effect says, that it is the law that the rights of third persons (*i. e.* material men) cannot be affected (unless notice is brought home to them) by any private agreement between an owner and a master, for the hiring of the entire ship, and he cites *Story* (§§ 297, 298, on p. 441). He also cites the authorities in this state. This is in accordance with the principle laid down in *Provost agt. Patchin* (5 *Seld.* p. 235).

PECKHAM, J. A *prima facie* case of liability was shown against the defendants, by proofs of the sale and delivery of the supplies to Rogers, as captain of the vessel. The fact that he was captain, gave him authority to bind the owners in the purchase of supplies, in the absence of any proof qualifying the relation of the parties (*Saxton agt. Reed, Lalor's Sup. to H. & D.* 323, and cases cited).

It appeared on the trial that the vessel was registered in the name of the owners, with Rogers as captain. These facts being shown, it rested with the defendants to establish a defense. The defense attempted was, that Rogers was not the agent of the owners, but ran the vessel himself as commander and owner *pro tempore*. I think the testimony failed to sustain the defense; at least it was not so clear that the defendants could call upon the court to non-suit the plaintiff on that ground. The defense insists that the mere fact that the vessel was run on shares, was sufficient to discharge the owners from responsibility, as it would prove that the captain was the owner *pro hac vice*, and not the parties who had hired the vessel to him. We cannot assent to that proposition. It cannot be sustained on principle or authority. The real question in all such cases is, who by the charter party has possession, command and navigation of the ship? a mere question of fact (3 *Kent's Com.* 138, 5th ed).

There is nothing in this testimony inconsistent with the

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right of the owners to direct how and with what the vessel should be freighted, or at what rate of compensation or value, or when she should sail; or inconsistent with their rights to entire control over her; the division of her earnings being a mere mode of compensating the captain for his services as their agent. The owners took the vessel from the captain at Key West, before her voyage was completed, and told him to leave her, they receiving the residue of the supplies bought of the plaintiff, then remaining unused on the vessel. The captain, so far as appears, claimed no right to remain, but left, and never was again on board of her. There was no claim that the vessel had been chartered to the captain for any particular time. On such facts it is impossible to say as matter of law, that the captain was the owner for the time, and had possession and exclusive control of the ship. In the test cases in Massachusetts, relied on by the appellants, it is held that each case must depend upon its peculiar facts, as to whether the owner or the captain has possession, command and navigation of the ship.

In *Webb* agt. *Pierce* (1 *Curtis*, 104, at 108), the court say, whether the owners are liable for supplies furnished to the captains, depends on the facts of the particular case, though the vessel has been taken on shares. It is a question of fact, merely. *Saxton* agt. *Reed*, decides this case. There the vessel was "run on shares." The court properly held then that the effect of the arrangement was to provide a mode by which the master's compensation was to be determined.

It would not be profitable to criticize the numerous cases found in the reports of Massachusetts and other earlier states on this subject. Many are referred to in the cases already cited (*See Butler* agt. *Hockins*, 5 *Gray*, 595). They are all based on the same principle, viz: that the several owners are not liable when they have let the possession, command and navigation of the ship, not to one as agent, but for the time as owner, as much so as a tenant of a house is owner for his term. In such case the doctrine of agency has no application whatever. The hirer, then, in all contracts for supplies, acts for himself, and upon his own respon-

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sibility and credit, as much as the tenant of a dwelling in the purchase of supplies for his family. (See *Macy* agt. *Wheeler*, 30 N. Y. 231; *Stedman* agt. *Feidler*, 20 N. Y. 437.)

When the hirer is the owner for the time, of the vessel run on shares, the facts will show that the master not only commands the vessel, and manages her trade and employment, but victuals and mans her, and the moiety of the gross freight is not retained by him simply as a compensation for his services, but the share paid to the owners is rather to be regarded as their charter money for the use of the vessel (1 *Curt.* 112).

While the hirer is the temporary owner, he of course has more power over the vessel, her trade and employment, than an ordinary captain. The facts of this case, so far as presented, show simply an employment of the captain to run the vessel, not a hiring of the vessel to him. If the owners had said to the captain, we will pay you \$75 a month, or we will give you one-half of her gross earnings to sail her for us as captain, and you shall pay half of her disbursements, and find all her supplies, the responsibility of the owners for supplies to third persons, ignorant of the arrangement, would not have been changed.

The captain in this case testified at the trial that he "did on board of this vessel, and with regard to her business as captains generally do." He does not seem to have had, or to have claimed, any other authority or power in regard to her.

It would seem to be clear, therefore, that he never hired the vessel, either in the ordinary or in the legal sense of that phrase. He was simply an employee of the owners, and they remain liable for supplies.

There is no other question calling for discussion in the case. The fact that these supplies were purchased at a port other than where the vessel lay, is not presented, and should not be decided. It was not argued as a ground of non-suit, nor was the court requested to charge thereon. The charge was excepted to except in gross, and hence no part is presented for review.

The judgment is affirmed. Unanimously concurred in.

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SUPREME COURT.

LYMAN SADDLESVENE, appellant agt. JAMES D. ARMS, respondent.

The Code does not authorize an *attachment* in an action for a *tort*.

It was not intended by sections 227 and 229, to extend the remedy by attachment to cases other than those specified in the Revised Statutes. (*All the reported cases on this question under the Code, examined.*)

Erie General Term, November, 1866.

GROVER, P. J., DANIELS, MARVIN and DAVIS, Justices.

APPEAL by plaintiff from order denying motion for a new trial. The action is to recover possession of a horse. The plaintiff gave evidence tending to prove title to the horse in himself and that the defendant took the horse from his possession.

The defense was that the defendant was sheriff of Niagara county, and took the horse by virtue of an attachment against one James Kenedy, in favor of one Hannah Covert, in an action for *assault and battery*.

The plaintiff objected that such attachment was unauthorized. The court overruled the objection, and the plaintiff excepted.

The defendant gave evidence tending to prove that the sale of the horse by Kenedy to the plaintiff was fraudulent and void as to Hannah Covert.

The defendant had a verdict.

FARRELL & BRAZEE, *for defendant.*

MURRAY & GREEN, *for plaintiff.*

By the court, MARVIN, J. Is an attachment authorized in an action for assault and battery? In *Hernstein agt. Matthewson* (5 How. Pr. R. 196), decided in 1856, EDMONDS, J., decided that the Code allowed an attachment to issue against a non-resident defendant in every action, whether for a wrong or on contract.

In *Ward agt. Begg* (18 Barb. R. 139), the action was on

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contract, and the amount the plaintiff was entitled to receive was certain. MITCHELL, J., in his opinion, remarked: "It is not necessary under the Code, that the plaintiff should have a cause of action for the payment of money merely, to have an attachment;" it is enough that "a cause of action exists against the defendant, and that the amount of the claim and the grounds thereof are stated," citing Code, section 229. This was a general term decision in 1854.

In *Floyd agt. Blake* (19 *How. Pr. R.* 542), decided at September special term, in 1860, the action was for assault and battery, Justice JAMES upheld an attachment, as a provisioal remedy. He discussed the question fully, referring to sections 227 and 229 of the Code. The above are the cases cited by the defendant's counsel.

The plaintiff's counsel cited the following cases: *Gordon agt. Gaffey* (11 *Abb. p.* 1). The action was for damages arising from the burning of the plaintiff's barn and its contents. HOGEBOM, J., at March special term, 1859, decided that the attachment was unauthorized, and set it aside. He held that section 227 of the Code refers to cases where a sum of money is specified in the summons, as the sum for which the plaintiff will take judgment if the defendant fails to answer the complaint. It will be seen that this decision was more than a year earlier than that of *Floyd agt. Blake*, though it is not probable that Justice JAMES was aware of it.

Shaffer agt. Mason (29 *How.* 55), was decided at the New York February general term, 1865, by INGRAHAM, SUTHERLAND and CLERKE, Justices. The arguments of counsel were elaborate, and the opinion of the court is by SUTHERLAND, J., who takes notice of the prior decisions. The action was trespass for taking and carrying away personal property. It was held that no attachment could issue in such a case, nor in any action of tort independent of contract.

Ackroyd agt. Ackroyd (20 *How. Pr. R.* 93), is a special term decision by LEONARD, J., in 1860. The action was by one partner against another for an account, claiming a large amount due. It was held that no attachment could be issued in the case.

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The weight of authority is decidedly adverse to an attachment in a case like the present. The language of the Code (§§ 227, 229), is now, "in an action for the recovery of the money against," &c., the plaintiff may have the property of the defendant attached. "The warrant may be issued whenever it shall appear by affidavit that a cause of action exists against such defendant, specifying the amount of the claim, and the grounds thereof," &c. This language, as has been said, is quite broad.

It will be noticed by consulting the Code of 1848, that it contains no provisions touching attachment. The law was left in the state it then was. The remedy by attachment, is first found in the Code of 1849. The system is unfolded in sections 227 to 243, inclusive. The Revised Statutes contain a system of proceedings in favor of *creditors* against *debtors*, by which the property of the *debtor* may be attached for the *payment* of his debts, under certain circumstances. (*See part 2, ch. 5, title 1, art. 1 and 2.*)

The attachment may issue upon "a demand against such debtor personally, whether liquidated or not, arising upon contract, or upon a judgment or decree rendered within this state" (2 *R. S.* 3, § 3). The language is the same in the act relating to a justice's court (2 *R. S.* 230, § 27). Thus the remedy by attachment of property, was confined to a demand against a debtor arising upon contract, or judgment or decree. It was not necessary that the demand should be liquidated. But the application for the attachment is to specify the sum in which the debtor is indebted, over and above all discounts. (2 *R. S.* 3, § 4; *Id.* 23, § 28.)

Is it reasonable to suppose that the legislature of 1849 intended to depart so widely from the system theretofore existing, as to include all actions whatever, in which the plaintiff might recover a verdict in dollars and cents? I do not think it is, and although the language in section 229 is broad and general, I think the Code as a system, furnishes some evidence that such was not the intention. It is to be assumed that the legislature in enacting these provisions in 1849, understood the provisions of the Code then in force,

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enacted the year before. All the previous forms of pleading were abolished (§ 118, *now* 140), but the leading distinction between actions on contract and for a tort were not abolished (§§ 167, 286); the kinds of execution, &c.

The action is to be commenced by the service of a summons. It is to contain a notice in actions arising upon contract, for the recovery of money only, that the plaintiff will take judgment for a sum specified therein, &c. In other actions the notice is, that if the defendant shall fail to answer the complaint, the plaintiff will apply to the court for the relief demanded in the complaint (§ 129). This section has given rise to a great conflict of decisions. At one time it was supposed that the form of the notice was to be controlled by the fact whether the action arose on contract, or for a tort. But in subsequent cases, great stress has been placed upon the words "for the recovery of money only," and "that he will take judgment for a sum specified therein." See *Tuttle* agt. *Smith* (14 *How.* 395), in which the question as to the form of the notice is elaborately discussed by EMOTT, J. He came to the conclusion that the phrase "for the recovery of money only," must be construed to mean the recovery of a definite sum of money as such, and without calling upon the court to ascertain or adjudge anything but the existence and terms of the contract by which it is due. He refers as favoring this construction, to section 246, touching judgment when the defendant fails to answer the complaint. By this section, numerous cases arising on contract, require that application be made to the court.

I am inclined to agree with Judge EMOTT in the construction he gives to section 129, touching the notice which the summons is to contain. After noticing the fact that prior to 1857, the language in section 227 of the Code was, "in an action for the recovery of money," and that by the amendment that year the article "the" was inserted before "money." Justice SUTHERLAND, in *Shaffer* agt. *Mason* (*supra*), intimated that "the money," must now mean the money demanded in the summons in the action. If the learned judge intended to adopt the construction of section 129, as

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given in *Tuttle agt. Smith (supra)*, I apprehend that the remedy by attachment in an action under the Code, would be more restricted than it is by the Revised Statutes, against the property of absconding, &c., debtors. It would exclude a class of cases arising on contract, when the damages are not liquidated, though the creditor may be able to "specify the sum in which the debtor is indebted, over and above all discounts," as required by the Revised Statutes.

Though I am not willing thus to restrict this section, yet I think the amendment inserting "the" before "money," was made with a view of making it more clear that the remedy by attachment was confined to actions arising upon contract, and in which the plaintiff could state the sum due him. In short, that the amendment had some reference to section 129, without, however, intending to sanction the construction of this section, touching the form of the notice, given to it in *Tuttle agt. Smith*. I am entirely satisfied that it was not intended by sections 227 and 229, to extend the remedy by attachment to cases other than those specified in the Revised Statutes.

I think this position will be strengthened by a careful examination of the provisions contained in this chapter of the Code. "The amount of the claim and the grounds thereof," are to be specified. It is to appear by the affidavit that the defendant is a foreign corporation, or not a resident of this state, or has departed therefrom with intent to defraud his creditors, &c.

By section 231, the sheriff is to attach property sufficient to satisfy the plaintiff's demand, the amount of which must be stated in conformity with the complaint.

Sections 240 and 241, provide for the discharge of the attachment upon the application of the defendant. He is to give an undertaking, executed by at least two sureties, to the effect that the sureties will pay the amount of the judgment that may be recovered in the action, not exceeding the sum specified in the undertaking, which shall be at least double the amount claimed by the plaintiff in his complaint. If upon appraisal, the property attached be less than the

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amount claimed, then the undertaking is to be double the amount of the appraisal.

Now take an action for slander, or assault and battery, the amount of the recovery demanded being \$10,000, \$20,000, or \$50,000, when it is not probable that the recovery will ever exceed \$500. Indeed, the assault and battery, or the slander, may be of the most trifling character, and the action may end in a verdict for nominal damages. Is the Code open to the objection that under such circumstances a plaintiff may estimate his own damages, and then attach the property of the defendant sufficient to satisfy such damages, and retain the property until the defendant shall give two sureties in double the amount claimed in the complaint? The sureties are to be approved by the court or officer. It is not a satisfactory answer, to say that there can be no danger of such practice, because the plaintiff is by affidavit, to specify "the amount of the claim, and the grounds thereof." It is true, he is to specify the amount of the claim, and the grounds of it, but in most actions of tort the damages are uncertain and entirely unknown, until the verdict of the jury is rendered, and the plaintiff may fix them at any sum, without the fear of conviction for perjury. This will not be so, if the action is for the breach of a contract, for then the facts constituting the contract, and the breach, must be stated as the "grounds" of the claim, and "the *amount* of the *claim*" must be stated. Here are sundry facts to be stated, and if they are not truly stated, the person making the affidavit may be convicted of perjury.

The truth, in my opinion is, that the author of the language in sections 227 and 229, never contemplated an attachment in an action for a tort. The word "*claim*" is used as equivalent to *debt* or *demand*, which the defendant was bound by his contract to pay or discharge. The word "*demand*," is used in the Revised Statutes (*Vol. 2, p. 3, § 3*). Demand or claim, is properly used in reference to the *cause* of action. A claim is a demand of a right or supposed right; a challenging one another for something due or supposed to be due, as a claim of wages for ser-

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vices (*Web. Dict*). *Bouvier* says: "A claim is a challenge of the ownership of a thing which a man has not in possession, and is wrongfully withheld by another. The word *claim* can have no application to an action for assault and battery, or for libel or slander. It might be applicable in an action to recover the possession of personal property. The Code requires that the *amount* of the claim should be specified. It must be something, then, the *amount* of which in dollars and cents, can be specified. It is a demand of a right or thing withheld, the amount of which can be stated in money. It has no reference, as used in the Code, to *damages*, though it may be in many actions on contract, that the "claim" and the *damages* may be the same in amount. Damages are the indemnity given for breaches of contract, or for tortious acts. The Code speaks of damages as something entirely distinct from the cause of action (§§ 276, 277, 154, 261, 263, 386, 387). Turn to section 142 of the Code; the complaint is to contain (*sub.* 2) a statement of the facts constituting a cause of action; also (3) a demand of the relief to which the plaintiff supposes himself entitled. If the recovery of money be demanded, the amount thereof shall be stated. Here is a clear distinction between the cause of action and the relief demanded.

In stating the facts constituting the *cause of action* for assault and battery, nothing is said of amounts of money, but the relief demanded is money, and the amount is stated. In short, the Code throughout distinguishes between the cause of action and the relief to be demanded; and when in sections 227 and 229, it authorizes an attachment "in an action for the recovery of the money," when "it shall appear by affidavit that a cause of action exists against such defendant, specifying the *amount* of the *claim*, and the grounds thereof;" this remedy is confined to actions upon contract, in which the *amount* to which the plaintiff is entitled can be specified; and it is a wide departure from the fair construction of the language here used, and from the theory and science of the Code, to refer the word *claim*, to

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the relief demanded in the complaint, and the word *amount*, to the sum of money demanded as damages.

The order denying a new trial should be reversed, and there must be a new trial, costs to abide event.

SUPREME COURT.

DEWITT GRAHAM and others agt. PETER CHRYSTAL.

Secondary evidence is not admissible, if by reasonable diligence, the original could have been produced.

The sufficiency of the proof of the loss of an instrument, is a point addressed to, and determined by the court exclusively :

Held, therefore, that a referee having been satisfied that there was not sufficient proof of loss to admit secondary evidence, the court, on appeal, will not say that he erred.

New York General Term, May, 1865.

Before INGRAHAM, BARNARD and CLERKE, Justices.

By the court, CLERKE, J. We see no better reason for disturbing the findings of fact in this case, than in that in which John Graham is plaintiff.

The exceptions in this case worthy of any consideration, are with the exception of one, similar to those in the other, and must receive the same disposition.

The exceptions have been treated by the counsel in both cases as similar, except that relative to the ruling rejecting parol evidence of the contents of David Graham's notes to the defendant. While admissions made by David Graham, could not bind John Graham, they would bind himself and his representatives.

The only question, therefore, on this point is, whether sufficient proof of the loss of the notes was given, to allow secondary evidence of their contents. Secondary evidence is not admissible, if by reasonable diligence the original could have been produced.

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The degree of diligence depends on the nature of the transaction to which the paper relates, and other circumstances. The sufficiency of the proof of the loss is a preliminary point, addressed to and determined by the court, exclusively, and upon which it has to pass, in view of the peculiar features which characterizes each case as it arises.

In the case before us, the witness testified that he had looked for the notes among his papers, and could not find them. He did not say where he had made the search, or that he had made a diligent search. He gave no particulars, and did not state whether he believed they were lost.

The referee, who had the witness before him, was undoubtedly the best judge of the reliability of this preliminary proof, and he was satisfied that there was not sufficient proof of the loss of the notes to admit secondary evidence of their contents. We cannot say that he erred in excluding it.

I think the judgment should be affirmed, with costs.

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SUPREME COURT.

JOHN W. BRIDENBEKER, Treasurer of the Frankfort Cheese Factory, appellant, agt. JOHN L. HOARD, respondent.

An action to recover several penalties under chapter 361 of the laws of 1865, for bringing watered milk to a cheese factory, to be manufactured into cheese, may be maintained by and in the name of the treasurer of the association, against a member of the association.

Fifth District General Term, January, 1867.

Before BACON, MULLIN and FOSTER, Justices.

APPEAL from a judgment of non-suit ordered at the Herkimer circuit, in May, 1866, before BACON, Justice. The facts appear in the opinion.

S. & R. EARL, *for appellant.*

The action was brought to recover penalties under chapter 361, laws of 1865, for bringing watered milk to a cheese factory.

The defendant in his answer, besides a general denial, seems to take two other grounds of defense.

(1) That the Frankfort Cheese Factory was not such an association as would enable the plaintiff to maintain the action as its treasurer.

(2) That the plaintiff alone could not maintain the action, as there were other persons also interested.

The judge at the trial held that the plaintiff could not maintain the action, and excluded the proof, and non-suited him.

I. The Frankfort Cheese Factory is such an association or company as can sue in the name of its treasurer. (*Laws of 1849, chap. 258; Laws of 1851, chap. 455; N. Y. Marble Iron Works agt. Smith, 4 Duer, 362; Tibbitts agt. Blood, 21 Barb. 650; Corning agt. Green, 23 Barb. 33; Witherhead agt. Allen, 28 Barb. 661; Dewitt agt. Chandler, 11 Abb. Pr. R. 459, 470.*)

The dictum of Judge SHANKLAND, in *Austin agt. Searing*

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(16 N. Y. 112), is without reason, and wholly unauthorized.

II. Even if this were not so, the incapacity of the plaintiff to sue, and the defect of parties, appear upon the face of the complaint, and hence this objection could only be raised by demurrer and not by answer, and is waived in this case. (*Code*, §§ 144, 147, 148; *Ingraham agt. Baldwin*, 10 How. 162; *Baggett agt. Bardger*, 2 Duer, 160; *Gassett agt. Crocker*, 10 Abb. 133; *Dennison agt. Dennison*, 9 How. 246; *Zabriskie agt. Smith*, 3 Kern. 322, 336; *Fosgate agt. The Herkimer Manufacturing and Hydraulic Co.* 12 N. Y. 580.)

And when a cause of action is set forth in the complaint, in favor of some one against the defendant, it cannot be said that the complaint does not state facts sufficient to constitute a cause of action. (*Bank of Lowville agt. Edwards*, 11 How. 216; *Vibert agt. Frost*, 3 Abb. 120; *Myers agt. Machado*, 6 Abb. 198; *Hobert agt. Frost*, 5 Duer, 672.)

III. At all events, the action is properly brought under chapter 361, laws of 1865.

All that the statute requires is, that the suit should be "for the benefit of the person or persons, firm or association or corporation, or their assignees, upon whom such fraud shall be committed."

This action is brought for the benefit of the association by the plaintiff, who is a member and the acting treasurer.

IV. The fact that the defendant was a member of the association, can make no difference. Under the statutes of 1849 and 1851, an action can be brought in the name of the president or treasurer, against a member in a proper case, as well as against any other person.

In reference to the commencement and defense of actions, these associations under the statutes, are clothed with corporate powers. See section 5, of the law of 1849.

Unless this were so, the object of these statutes would, in many cases, be defeated.

V. But if we are so far wrong, then this action may be treated as an action by Bridenbecker alone, against the defendant, and all the allegations as to his representative

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character may be regarded as surplusage. (*Davis* agt. *Garr*, 6 N. Y. 124; *Merritt* agt. *Seaman*, 6 N. Y. 168.)

(1) The plaintiff alleges facts in his complaint showing that he individually was defrauded by the act of the defendant.

(2) The plaintiff as a person defrauded, could under the act of 1865, sue alone for the penalty.

(3) The statements in the complaint in relation to the representative character of the plaintiff, do not vitiate, while the facts alleged show that the plaintiff was entitled to sue in his own right.

(4) To test the ruling of the judge, all the facts alleged in the complaint may be taken as admitted; and it is no answer to the facts that the plaintiff could not maintain the action as treasurer; for conceding that to be so, he could maintain the action in his own right.

But no such defense or objection as we are now considering, was foreshadowed in the answer. If it were allowed to prevail, it would be a surprise to the plaintiff, and would work him a great wrong.

(5) No court ought to be astute to discover formal defects, where the act complained of was of so mean and dishonest a kind as that in this case. A new trial will do the defendant more good than harm if he is innocent; and if he is not, he should not complain if formal defects are disregarded for the purpose of bringing him to justice.

The judgment should, therefore, be reversed, and a new trial granted, costs to abide the event.

FRANCIS KERNAN, *for defendant*.

I. The action is brought by the plaintiff as treasurer of the Frankfort Cheese Factory; and unless he is entitled to recover in this capacity the penalties claimed, he was properly non-suited. (*Complaint*, 6 to 16; *Answer*, 17 to 21; *Trial*, 32 to 34.)

II. The plaintiff is not entitled to recover in his capacity as treasurer.

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1. He clearly could not maintain the action under the statute, as originally passed, as to actions by and against joint stock companies and associations (3 *R. S.* 5th ed. p. 777). This only applied to what were known in the law as "joint stock companies or associations" (3 *R. S.* *supra*, §§ 122 to 125).

2. The Frankfort Cheese Factory, was in no legal sense a joint stock company or association (*Evidence*, 27 to 32).

Joint stock companies or associations, are constituted by articles of association ; the stock is divided into shares, transferable by assignment or delivery, and the business is conducted by a board of trustees. (*Story on Part.* § 164 ; 3 *R. S.* *supra*, §§ 123, 125.)

3. The amendatory act of 1851 does not authorize the action. (*Chap. 455 of Laws of 1851 ; found in 3 R. S.* 5th ed. p. 778.)

This act should be construed with reference to and in harmony with the original act. It at the most extends only to companies or associations, in the nature or having the characteristics of joint stock companies. It does not mean that a loose association like the one in question, can sue and be sued, by a person they may name as president or treasurer. Such a construction would lead to great confusion (*Austin agt. Searing*, 2 *Smith*, 113, 117, 125).

4. The defendant was a member of this association. Under these statutes, the association by its treasurer, cannot maintain an action against one of its own members. The suits authorized to be prosecuted in the name of the officer, are suits by and against the association ; not suits accruing to one or more members of the association against other members of the same association. (*See Statutes, supra.*)

III. The plaintiff, as treasurer of the association, could not maintain an action against the defendant, a member of the association, for the penalties given by the statute.

1. The penalty is given by the statute to the person or persons, firm or association, or corporation, upon whom the fraud shall be committed (*Laws of 1865*, p. 638, § 1).

2. Both by the Revised Statutes and the Code of Procedure, the action must be in the name of the party or par-

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ties injured, and entitled to the penalty. (3 *R. S.* 5th ed. p. 783; *Code*, § 111.)

3. The plaintiff as treasurer, had no right to, or interest in the penalty. If recovered by him as treasurer of the association, the funds when collected, would in part belong to the defendant, who was a member of the association. If the plaintiff could rightfully prosecute the action and is defeated, the defendant is responsible for a portion of the costs.

4. The action should have been in the name of the persons injured by the wrongful act of the defendant. They are entitled to the penalty, and the suit should be in their name.

5. If it was the intention of the legislature to have authorized the action for the penalty, in the name of the treasurer of the association against one of its members, the act would have so stated.

IV. The ruling of the judge at the circuit was correct, and the judgment should be affirmed.

By the court, FOSTER, J. The action was brought to recover several penalties under chapter 361, of the laws of 1865, for bringing watered milk to a cheese factory, to be manufactured into cheese.

The first count of the complaint alleged, that during the months of May, June, July, August, September and October, 1865, the plaintiff and a large number of other persons, more than seven in all, including the defendant, were associated together for the purpose of manufacturing and selling cheese, at Frankfort, in Herkimer county. That the name of the association was "The Frankfort Cheese Factory." That during all that time all the persons belonging to the association brought their milk to the factory, and all the milk was mingled together and manufactured into cheese. That the cheese was then cured and prepared for market. That the factory was managed and the cheese sold by a committee or agents, chosen or appointed by the members of the association. That after the cheese was sold, from time to time, the expenses of making, curing and preparing the

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cheese for market, were first deducted from the proceeds of the sales, and the balance was divided among, and paid to the members of the association, in proportion to the quantities brought by each of them.

That the plaintiff was the treasurer of the association, and that he commenced the action for, and in behalf, and for the benefit of the said association. It then alleged that in the month of May, 1865, the defendant knowingly brought to the factory to be manufactured into cheese, a large quantity of milk diluted and mixed with water, which was mingled with the other milk brought to the factory ; all of which was done by the defendant in violation of chapter 361, of the laws of this state, passed April 10, 1865, and claimed to recover a penalty of \$100, for the benefit of the association.

There were six other similar counts in the complaint charging the same facts, except that the second count charged the defendant with the commission of a like offense, but at different times, within the months aforesaid, and claimed a distinct penalty of \$100 for each offense charged.

The answer contained a general denial, and also three other separate answers ; the first of which specially denied the existence of any such association as was alleged in the complaint. The second denied that the plaintiff sustained any representative capacity to the alleged association or partners of the cheese factory, and insisted that the plaintiff had not the capacity to maintain or prosecute the action, and that he should not be allowed to proceed therein ; and the last of which alleged that divers other persons besides the plaintiff, brought milk to the cheese factory, at all the several times mentioned, and mingled the same with the milk of the plaintiff and of the defendant ; that they are all interested in the alleged cause of action ; that they are within the jurisdiction of the court, and claimed that they were necessary parties to the action, and that the plaintiff should not be allowed to proceed without their being joined as parties.

On the trial, the plaintiff called Sidney A. Farington as a witness, who testified as follows : I had charge of the

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Frankfort Cheese Factory in the years 1864 and 1865; the first year we received and manufactured the milk from about four hundred and fifty cows, and the second year from about eight hundred cows; the plaintiff. John W. Bridenbecker, was the treasurer both years; there were about eighty members of the association in the year 1864, and about eighty in the year 1865; there were no written articles of association, nor was there any written agreement signed by any of the members, or any written proceedings or by-laws, for the organization or conducting the business of the association; the following was the system upon which the association was organized and conducted: each member brought to the factory the milk of his cows, and the milk was weighed and an account kept of the weight, and the milk was all mingled together and manufactured into cheese; I had the charge of the factory, and for a consideration to be paid to me manufactured the cheese, and took care of the same until it was sold; I was paid so much per hundred pounds of cheese; there was a committee appointed by the members, whose duty it was to sell the cheese and pay over the proceeds to treasurer, and then the treasurer would first pay me, and deduct all expenses, and divide and pay the balance to all the members, in proportion to the quantity of milk by them respectively brought to the factory; John W. Bridenbecker, the plaintiff, William Bridenbecker, Alexander Bridenbecker, John W. Davison, Hiram Joslin, Warner Borfy, John Thomas, the defendant Hoard, and others, were the members; they varied and changed from time to time, during the season of 1865, but I don't recollect of any instance of any being taken out until in the fall, when the milk began to grow short to make cheese; members could join or withdraw at pleasure; the association was called and known by the name of the Frankfort Cheese Factory; all the proceeds of the cheese sold in the year 1865, has been divided and paid over to the members, and the members now hold no joint property except the sum of \$200 collected of another member for bringing watered milk to the factory, and this claim in suit against Hoard.

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The plaintiff then offered to show all the facts alleged in the complaint *seriatim*, and particularly that the defendant brought watered milk to the factory, as alleged in the complaint, and upon all the occasions mentioned in the complaint.

To this evidence defendant's counsel objected, on the ground that the plaintiff in his character or capacity as treasurer, could not maintain this action against the defendant, for and on behalf of the alleged association or associates.

The court sustained the objection and excluded the evidence, and held and decided that the plaintiff as treasurer, had not legal capacity to maintain the action.

That an action in behalf of the association, for the penalties claimed herein, could not be maintained in the name of the plaintiff as its treasurer. That the plaintiff, as treasurer of the association, could not sue the defendant, who was a member, for the penalty.

To which rulings and decisions, the plaintiff duly excepted.

The plaintiff then rested, and the court on the motion of defendant's counsel, non-suited the plaintiff; to which ruling and decision the plaintiff also duly excepted.

Judgment of non-suit was accordingly entered, and the plaintiff brought his appeal.

It seems to be clear that the act of 1849, chapter 258, authorized actions to be brought in the name of the president or treasurer of joint stock companies or associations, only when such joint stock companies or associations were organized under some statute of the state; and that when organized without such authority, by whatever name they were called, they were really but copartnerships, and subject to the application of such rules in regard to suing and being sued, as apply in the case of copartners. (*Wells agt. Gates*, 18 Barb. 554; *Tibbitts agt. Blood*, 21 Barb. 650, 654-5.)

The act of 1851, chapter 455, as clearly appears, as well from its enacting clause as by the language of its first section, was intended to extend the right to sue by the president or treasurer to other classes of companies or associations than such as were embraced in the act of 1849; and in

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unmistakable language "extended" the act of 1849 "to any company or association composed of not less than seven persons, who are owners of, or have an interest in, any property, right of action, or demand, jointly or in common, or who may be liable to any action on account of such ownership or interest."

And this court has repeatedly held that the act of 1851 did extend the right to sue to other companies and associations than such as were organized in pursuance of some statute, or such as were *quasi corporations*. (*Tibbitts agt. Blood, supra*; *Corning agt. Greene*, 23 Barb., 33; and *DeWitt agt. Chandler*, 11 Abb. Pr. R., 459, 470.) The only case cited to the contrary is that of *Austin agt. Searing* (2 Smith, N. Y. R. 113, 117 and 125), where Mr. Justice SHANKLAND, in his opinion, comes to the conclusion that the act of 1851, as well as that of 1849, relates only to the case of such *quasi corporations*; this is of no weight as authority, for it appears from the case that the determination of that question was not involved in the decision, that it was decided upon another ground, and that all the other members of the court declined to express any opinion upon that question, or to concur with him.

Assuming that the testimony of Farrington was true, it cannot be doubted (if I am right as to the extension of the provisions of the act of 1849 and the provisions of the act of 1851), that, in a proper case of demand or claim of the association against a third person, it could sue, as was done in this case, in the name of its treasurer; for it appears from his testimony that from the time the milk of the several persons who constituted the association reached the factory they all had an interest in it, and in the proceeds of it, in common with each other; and that when the net proceeds had been reached, each of them was entitled to receive from the association just such proportion thereof, as the quantity of milk delivered by him, bore to the whole amount furnished by all the associates.

Whether the act of 1851, authorizes the treasurer to bring an action against an individual member of the association

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formed as this was, in any case, has not, so far as I am aware, been determined ; and for the purposes of this case, I assume that it does not. And the question then arises, is such action conferred by the act of 1865, chapter 361 ? For if not, I am inclined to the opinion that the non-suit was right.

I have come to the conclusion above expressed, that when an action can be maintained at all by such company, it can be maintained in the name of the treasurer ; but the more important question is, does the act of 1865 allow such action to be brought against one of the corporators ? The language of the act, so far as it applies to this action, is that “ whoever shall knowingly sell, supply, or bring to be manufactured to any cheese manufactory in this state, any milk diluted with water, &c., shall for each and every offense, forfeit and pay a sum not less than \$25 nor more than \$100, with costs of suit, to be sued for in any court of competent jurisdiction, for the benefit of the person or persons, *firm*, or association or corporation, or their assigns, upon whom such fraud shall be committed.”

This language, “ *whoever shall sell, supply or bring, &c., to any cheese manufactory in this state,*” is comprehensive enough to include the case of one of the corporators who shall bring diluted milk ; and yet it does not necessarily follow that such is to be its construction, because we must be satisfied that the case of an offense committed by one of such associates, is within the language and the *intention* of the statute, before we can hold him liable for the penalty which it imposes. We are to ascertain, if we can, whether the legislature did intend to include such a case.

It is not claimed that such an action as this, could not be maintained by the treasurer of a *quasi* corporation, against one of the associates, for offenses against the act of 1865, nor can it be doubted—assuming the right of a treasurer to sue—that an association like the one in question, could maintain such action against any person who was not an associate. But how much more appropriate to denote an intention confined to these two classes of delinquents, would it have been to have used the words “ whoever shall *sell*, or

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bring to be manufactured *for himself*," &c., because one or the other of these ways would probably be adopted by one of the corporators, or by a stranger, who should take his milk to a cheese factory. For if a corporator, the milk would be the property of the corporation, and he would be entitled to his pay therefor, as between him and the corporation; he would not be one of the owners of the milk or cheese, but would be entitled to any dividends on the amount of stock which he held in the corporation. And in the case of the stranger, he would either sell his milk, or have it manufactured for himself, and receive such quantity of cheese for a given quantity of milk, as should be agreed upon, irrespective of whether the association made or lost money in the business.

It appears to me from the language employed, that the legislature intended to include *all cases* of bringing diluted milk to a cheese factory to be manufactured, whether the act complained of was done by a corporator or associate.

It is to be presumed that the legislature, when the act of 1865 was passed, was aware of the extent to which the business of manufacturing cheese was carried on in cheese factories, and of the various kinds of companies formed for that purpose; and it is a proper presumption for us, that when the act was passed, it was intended to reach *all* the mischiefs existing, and to extend a like remedy to every kind of association or partnership formed for the purpose of such manufacture, and to reach the violators of the provisions of the act, whether associates or not. And it being a matter of common notoriety, that a large proportion of all the cheese so manufactured, was made by such associations as the one in question, it is to be inferred that the legislature when it used the words "*any* cheese manufactory in this state," intended to embrace such cases. I have, therefore, come to the conclusion that this case was within the mischiefs sought to be remedied, and that it comes within the language and spirit of the statute.

I am also of opinion, that independent of the acts of 1849 and 1851, the act of 1865, which imposes the penalty, does

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of itself give any of the associates the right to sue in his own name, for the benefit of all the members of the association; and that although the plaintiff sues as treasurer, it does not defeat the action, but should be held to be merely a description of the person.

The evidence offered was erroneously excluded, and the judgment of non-suit should be reversed and a new trial granted, with costs to abide the event.

Judgment was unanimously ordered accordingly.

SUPREME COURT.

SOLON HOWLAND, appellant agt. JOHN B. COFFIN and eleven others, respondents.

1. Where a final judgment provides that the plaintiff recover of the defendants \$42.05 damages without costs, and that the defendants recover of the plaintiff \$42.05 for costs and disbursements, and that said judgments offset or satisfy each other: It is appealable from, at the suit of the aggrieved party.
2. A contract to pay a broker five per cent commission for negotiating a charter of a vessel to the government, is not *per se* void on the ground that it contravenes public policy.
3. It must appear that the parties intended to make use of, or to resort to corruption or improper influences to obtain the charter, or that the undertaking was injuriously to affect or subvert public interests.
4. We are not to presume anything wrong in a transaction in which the government is concerned, any more than where private individuals are concerned.
5. Where the defendants, owners of a steamboat, contracted to pay the plaintiff, a broker, five per cent on amount of charter, obtained by him from the government for such steamboat; that is to say, on \$200 per diem, "more or less, as long as she remains in government service:" A reduction of the charter compensation from \$200 to \$120 per diem, without the consent or knowledge of the broker, by a simple indorsement on the charter party, without any other change in its provisions, the vessel continuing in the government employ, does not amount to a new charter, so as to deprive the broker of his right to compensation on the reduced amount. In such case, the identity of the instrument or the transaction is not affected by the indorsement, so as to deprive the broker of his compensation under the contract in suit. The vessel still, within the meaning of the contract, remained in the government service under the original charter.

New York General Term. December 1866.

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Before G. G. BARNARD, P. J., T. W. CLERKE and DANIEL P. INGRAHAM, Justices.

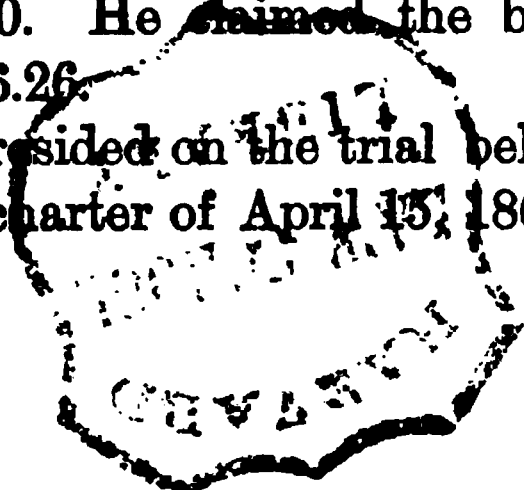
THIS was an appeal taken from a judgment entered on a verdict of a jury for \$42.05. The claim was for \$1,700, commissions at five per cent, for negotiating a charter for defendants (who were owners of the steamboat *Seth Low*) to the government, during the war.

The charter was for \$200 a day for thirty days, and for such longer time as the government should require her. It was dated April 15, 1862. Under it the boat continued in the service of the government until December 1, 1863, when an entirely new charter was made, about which the plaintiff made no claim. The plaintiff based his claim for commissions under the provisions of the following agreement, viz: "I hereby agree to pay to Solon Howland, on account, of his obtaining a charter from the government for the steamer *Seth Low*, five per cent on amount of charter—say \$200 per diem, more or less—so long as she remains in government service."

The government paid the defendants \$200 per day, up to March 25, 1863, when it reduced the per diem compensation to \$120 per day, which was paid until December, 1863, the date the charter was made. All of the receipts prior to 1863, for the per diem compensation of the boat, were paid on the original charter of April 15, 1862. The owners of the vessel recognized the right of the master of the vessel to bind them to the plaintiff's compensation by the contract in question, and their clerk or treasurer regularly paid him five per cent on the charter money received by them, until March 25, 1863, when they refused to pay him any more, on the ground that the reduction by the government at the price from \$200 to \$120 per day, was in effect a new charter of the vessel at that price, from the time of the reduction.

The defendants received on the charter \$98,920. They paid the plaintiff \$3,390. He claimed the balance of the per centage, viz: \$1,676.26.

Judge BOCKES, who presided on the trial below, held that under the contract, the charter of April 15, 1862, was ended



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whenever the government reduced the compensation from \$200 to \$120 per day.

To this ruling the plaintiff's counsel excepted.

The plaintiff then requested the court to charge :

1st. That the plaintiff was entitled to recover five per cent on the amount of charter moneys actually received or earned by the defendants from April 15th until December 1, 1863, the date of second charter. This the court refused, and plaintiff excepted.

2d. That the plaintiff was entitled to recover five per cent on \$200 per day, from time steamer entered into service under charter party of April 15, 1862, until December 1, 1863. This was refused, and plaintiff excepted.

The plaintiff's counsel requested the court to rule that the indorsement reducing the price of charter from \$200 per day unto \$120 per day, amounted to nothing as concerned plaintiff, and he was entitled to recover five per cent on \$200 a day for whole time. This was refused, and plaintiff excepted.

Under the direction of the court, in a charge corresponding with the above rulings, the jury found a verdict for the plaintiff for \$42.05. To which directions the plaintiff again severally excepted.

The appellant proved that he did not consent to the reduction of the \$120, nor had he any notice of it until just before suit commenced.

In entering judgment on this verdict, the judgment roll contained a provision awarding the plaintiff judgment for the \$42.05, and then a further provision that the defendant recover of the plaintiff their costs, \$42.05, and that judgments offset each other.

DENNIS McMAHON, *for the appellant.*

I. The reasonable construction of the contract under which the plaintiff claimed his commission, is :

1. An agreement to pay the plaintiff five per cent on the amount to be received by the respondents under the charter of April 15, 1862, whether it be \$200 per diem, or more than

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that amount, or less than that amount; otherwise to what do the words "more or less" refer?

2. To keep on paying to the plaintiff that amount of percentage as long as the vessel remained in government service; otherwise what is the meaning of the words "so long as she remains in government service?"

Any other construction, we maintain, was erroneous, and the court below therefore erred in their rulings, and the plaintiff was entitled to recover his full claim. When a clause is capable of two significations, it should be understood in that which will have some operation, rather than in that in which it will have none (*Archibald agt. Thomas*, 3 Cow. 284).

The whole covenant is to be taken together, and if the intention of the parties be doubtful, that construction is to be adopted which is most beneficial to the covenantee (*Marvin agt. Stone*, 2 Cow. 781).

II. The circumstances surrounding the contract at and subsequent to the execution and duration, give effect to our construction of the contract, and prove the error of the court below.

1. The commissions agreed to be paid to the plaintiff were actually one half of the usual commissions in such cases.

2. The charter of the 15th of April, 1862, was a charter *for thirty days, and as much longer as her services may be required*, to be used as a tug or transport in Chesapeake Bay, where she must proceed with all practicable dispatch, and such other place or places as she may be required, &c.

Thus showing that all parties contemplated that the government would keep her longer than the chartered term.

3. By the charter, it is further provided that at its expiration the steamer shall be returned to New York, and compensation should cease when she should be so returned. Thus showing that the parties contemplated that the vessel would be in government employ under that charter for a longer period than the thirty days. She was not returned to New York until the new charter was made.

4. She was in fact in the government employ without any

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new charter, from April 15th, 1862, until December 1st, 1863, when a new charter was made out, for the commissions under which no claim is made.

The only change in the old charter in the meantime being a reduction of the \$200 per day to \$120 per day.

5. The parties: viz ; the government and the owners of the boat, notwithstanding the reduction; considered they were acting under the charter of April 15, 1862, up to December 1, 1863.

All the defendants bills and receipts were made out up to December 1, 1863, under the original charter of April 15, 1862. Also the certificates of payment indorsed.

In construing a written instrument it is proper to look at all the surrounding circumstances, and the pre-existing relations between the parties (*Blossom agt. Griffin*, 13 N. Y. R. 569).

III. The reduction of the chartered price of the steamboat in question, from \$200 to \$120, was not such a new charter of the boat as would defeat the plaintiff's claim to his commissions ; for,

(a) It was done by a mere indorsement on the charter of April 15, 1862.

(b) This indorsement was done without the knowledge or consent of the plaintiff.

(c) It did not in any way affect the other provisions of the charter of April 15, 1862, nor was it intended so to do, between the parties, excepting in the single case of the amount ; as both sides acted under the original charter in every other respect, from that time until the new charter of December 1, 1863, was made up.

(d) The words "more or less," contained in the contract on which the plaintiff sued, contemplated that the right to his commissions would exist notwithstanding any such reduction ; even if it did not, the owners of the vessel could not make such an indorsement without the plaintiff's knowledge or consent, and thereby deprive him of his right to his commissions. If they could, in the face of the provisions of the contract on which he sued, they could do so by the slightest

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diminution in the amount of the chartered price, at any time after it was made.

(e) The charter itself was under seal; the indorsement was by parol (15 *Wend.* 400). To give effect to the indorsement amounting to a new charter, it must appear that the parties intended a surrender of the original charter in all its parts and provisions, not a mere reduction of the per diem.

A broker is entitled to his commissions where he brings about a bargain, charter or sale, and when a contract is entered into, the parties to it cannot afterwards, by agreement between themselves, withdraw the matter from the broker's hands, and deprive him of his commissions. (*Wilkinson* agt. *Martin*, 8 *Carr. & P.* p. 3; *Chitty on Con. O. P.* 547; *Hosford* agt. *Wilson*, 1 *Taunt.* p. 12.)

Fourth. The court below erred in refusing to rule that the indorsement on the charter of April 15, 1862, reducing the price, amounted to nothing as concerns the plaintiff, and that the plaintiff was entitled to five per cent on \$200 a day for the whole time.

GILBERT DEAN, *for respondents.*

I. There is no judgment appealed from. This court has no jurisdiction.

The award of judgment provides that the judgment for the appellant for \$42.05, and for the respondents for \$42.05 for costs, should respectively offset each other. The judgments therefore satisfied each other, and there was no judgment to appeal from.

II. If there is a judgment, then the agreement becomes material. That agreement is limited to "a charter," and the commissions are limited to *the charter* obtained by him; that is, "five per cent on account of charter," not charters.

(a) The claim of the plaintiff is, that the words "so long as she remains in government service," do not relate to this contract or charter, but that the vessel was mortgaged to the plaintiff for all time.

(b) On the 25th March, 1863, a reduction in price was

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made to \$120 per day. This was in Washington, and plaintiff had nothing to do with it.

(c) A new charter party was made in December, 1863, containing different provisions ; one as to the value of the vessel ; and it was agreed that it should take effect from April 1, 1863.

(d) Owners objected to making this new charter party. Government took the first one, considering it as closed.

III. The judge decided rightly in holding that the charter ended when a new measure of compensation was agreed upon, and that between the captain, who was a part owner, and the government, without the intervention of the plaintiff. The judgment should be affirmed.

IV. The contract for the plaintiff's commissions was *contra bonos mores* (*American Tool Co. agt. Norris*, 2 Wallace's U. S. Sup. C. Rep. 45).

DENNIS McMAHON, *in reply*.

I. Even were the respective awards of judgment in this case considered as satisfying each other, yet such satisfaction is made under the direction of the court, which is appealed from. It is not a voluntary satisfaction on the part of the appellant.

II. The case of *American Tool Co. agt. Norris* (2 Wallace's Rep. p. 45), does not apply to this case, for in that one it was the partnership interest of Norris in the government contract awarded to the American Tool Co., which shocked the legal sense of the court. The government was defrauded by the extraordinary compensation paid. In the case at bar, it is simply one of a broker seeking to get a *bona fide* commission for negotiating a charter, at a rate which is shown to be one half the usual commission in such cases.

The case of *Sedgwick agt. Stanton* (14 N. Y. R. p. 289), displays the true rule ; also *Mills agt. Mills* (36 Barb. p. 474).

By the court, CLERKE, J. I. The respondents' counsel makes a point that there is no judgment in this case, and,

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therefore, nothing to appeal from. The final order provides that the plaintiff recover of the defendants \$42.05 damages, without costs, and that the defendants recover of the plaintiff \$42.05 for costs and disbursements, and that the said judgments offset each other. Thus they neutralize each other; but does it follow that there is no judgment? This order is something; it is a decision—a final decision—and what can that be but a judgment? The respondents' counsel is not correct, therefore, in saying there is nothing to appeal from. There is something, and that something must be deemed nothing else than a judgment—a judgment by which the plaintiff considers he has suffered wrong, and which he maintains is erroneous. The right of appeal could be effectually destroyed in many cases by a judge, if an arrangement of this nature should have the effect claimed by the defendants' counsel. A judgment, whatever may be its provisions, is the final determination of the rights of the parties (*Code*, § 245).

II. I do not think that the contract upon which the plaintiff sues is void on the ground that it contravenes public policy. *Sedgwick* agt. *Stanton* (14 *N. Y. R.* 289), gives us the law very distinctly on this point. Contracts illegal at common law, as being contrary to public policy, are those which injuriously affect or subvert the public interest. By the written contract in the case above referred to, the assignor of the plaintiff undertook to obtain, at his own expense, from the state for Stanton, a title to a lot in Syracuse, which Stanton then occupied and used for a store-yard, for which service Stanton agreed to convey, when the title should be obtained, one undivided half of the said lot. It was held that no public interest was violated in the performance of this contract. Its purpose was to induce the commissioners of the land office to act upon the question of Stanton's preemptive right to the lot. It was declared valid, and the judgment against Stanton was affirmed.

In *Mills* agt. *Mills* (36 *Barb.* 474), the agreement was to convey land to another upon the consideration that the latter would give all the aid in his power, spend his time and

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use his utmost influence and exertions to procure the passage of a law pending before the legislature, granting authority to the covenantor to construct a rail track for the running of cars on Division avenue, Williamsburgh. In the language of the justice who delivered the opinion in this case, "the plaintiff was not employed as he lawfully might be to prosecute a private claim, nor to collect information, prepare statements and furnish arguments freely and openly to a legislative committee, in favor of any public measure which might incidentally benefit individuals;" but he was to use such exertions and influences covertly, as have done so much to corrupt the public morals and impair the public virtue of the state and nation. It was held, that although some of the other considerations mentioned in the agreement were unexceptionable, it was nevertheless void, on account of the provisions to which I have referred.

In the case before us, the defendants agreed to pay the plaintiff a certain commission for obtaining a charter from the United States government for their steamship. We are not to presume necessarily, because this was a charter to be obtained from the government, that any corruption or improper influences were to be resorted to, or that the undertaking was injuriously to affect or subvert the public interest. We are not to presume anything wrong in a transaction in which the government is concerned, any more than where private individuals are alone concerned. The plaintiff had as good a right to obtain a charter of this kind for any other person, as he would have to obtain one for himself. If the defendants thought it best to employ an agent to procure this charter, who, perhaps, possessed better tact at, and had more time to devote to this business, they had a perfect right to do so, and by doing so were not doing anything necessarily detrimental to the public interests, the contract then is valid.

III. How far are the defendants made liable by it? They promised to pay the plaintiff five per cent on amount of charter, say \$200 per diem, more or less, so long as the

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vessel shall remain in government service. The charter was obtained by the agency of the plaintiff, and the government paid defendants \$200 per diem until March 25, 1863, when it reduced the per diem compensation to \$120. The defendants admitted that they were bound to pay the commissions to March 25, 1863, but as the compensation was reduced on that day, they maintain the charter which the plaintiff obtained ceased to exist, and from that day he is entitled to no commission. But the precise instrument on which the charter was written, was retained between the defendants and the government. Nothing was altered; not a single provision struck out or modified; the only change related to the compensation, and that was merely indorsed upon the instrument. This instrument was dated the 15th of April, 1862; it was of considerable length; contained numerous provisions; is very specific; is very carefully prepared, and is, as I have said, retained by the defendants and the government, as the compact by which they are to be governed during the continued employment of the vessel by the latter. They both, however, seem to think that circumstances render it proper that the compensation should be reduced, and they signify this opinion by an indorsement on this same instrument. In every other respect, not in the least degree, is a single sentence or word altered, and, in the words of the agreement, "the vessel remained in government service." The indorsement, in my opinion, has not affected the identity of the instrument or the transaction; and the defendants are liable for a commission of five per cent on \$200 per diem to March 25, 1863, and on \$120 per diem from that date to December 1, 1863.

The judgment should be reversed.

New trial ordered, costs to abide event.

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NEW YORK SUPERIOR COURT.

JOHN C. WALKENSHAW and another, survivors, &c., of HERMANN A. SCHLUCHER, on behalf of themselves and all other creditors of the firm of "JOHN G. PERZEL," electing to come in, &c. agt. JOHN G. PERZEL.

A notice of motion, served, cannot be withdrawn or countermanded, without payment of the costs of the motion.

But where a motion as originally noticed was 1st. For leave to add parties defendant: 2d. For an injunction and receiver: *Held*, that these motions were distinct, and that the first part of the motion might be withdrawn, leaving the second part still pending, *without payment of the costs of the motion.*

New parties cannot be added to the action without amendment of the summons; and the summons cannot be amended of course under section 172 of the Code, but leave of the court to amend must be obtained under section 173.

A plaintiff can obtain leave to amend the summons under the general prayer contained in his notice of motion, to wit: "for such other order or relief as the court shall see fit to grant."

When a party asks leave of the court to bring in new parties, he necessarily includes in that request, a further request for leave to make such amendment and take such steps, as shall be requisite to bring into court such new parties. Provision may be made in the order allowing new parties to be brought in, for the amendment of the summons and complaint, and the service of the summons upon the new parties, and the service of the amended complaint upon the parties already in, specifying in detail the proper proceedings to pursue, or it may simply allow them to be brought in, and the necessary amendments to be made to the summons and complaint, leaving the plaintiff to thereafter conduct his proceedings regularly, at his own peril.

At Chambers, December, 1866.

Decided December 12, 1866.

MOTION to amend, &c.

The plaintiffs in this case made a motion, 1st. Asking to bring in the executors of H. A. Schlucher, deceased, as parties defendant, and the general guardian of his infant children. 2d. Asking for the appointment of a receiver of the effects of the defendant.

This motion was adjourned by the court for one week. The plaintiffs thereupon, on the same day that the first motion was adjourned, procured another order to show cause why the executors of H. A. Schlucher, and the general guardian of the infant children, should not be made parties

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defendant, and served a notice on the defendant's attorneys that so much of the first motion as sought to make the executors and guardian parties, was thereby withdrawn.

IRA D. WARREN, *for motion.*

J. L. JERNEGAN, *opposed.*

JONES, J. It is settled in this court that a notice of motion cannot be withdrawn or countermanded, without payment of the costs of the motion. I see no reason for departing from this practice. The case, however, does not fall within such principle.

The motion as originally noticed, was 1st. For leave to add parties defendant. 2d. For an injunction and receiver. These two motions are distinct. The first part of the original motion has been withdrawn, leaving the matter as to the second part still pending. This can be done without payment of costs of motion.

It is undoubtedly true, that new parties cannot be added to the action without amending the summons, and equally true that the summons cannot be amended of course, under section 172; but leave of the court to amend it must be obtained under section 173.

The defendant in opposing this motion, calls to his aid the above principles, and insists that leave to amend the summons cannot be given on this motion, because that relief is not specifically asked for by the notice. I think he is mistaken. The plaintiff can obtain leave to amend the summons under the general prayer "for such other order or relief as the court shall see fit to grant." (*Martin* agt. *Kanouse*, 2 *Abb. P. R.* 390; *Hecker* agt. *Mitchell*, 5 *Id.* 453.)

But further, plaintiffs' order to show cause is "why the executors of Hermann A. Schlucher and the guardian of his infant children, should not be made parties to this action?" This is the principal relief asked for; the amendment of the summons and complaint is but the mere incident to the relief asked for. Such amendment is but the formal way of bringing the new parties, after leave to bring them in is granted.

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When a party asks leave of the court to bring in new parties, he necessarily includes in that request a further request for leave to make such amendment, and take such steps as shall be requisite to bring into court such new parties.

It is urged that when new parties are added, the complaint, if its allegations do not already show a cause of action against them, must be amended so as to show such cause of action; and if amended, then the amended complaint must be served upon parties already in, and such parties must have the usual time to answer.

It is also urged that the new parties must be brought in either by service of the amended summons or voluntary appearance; and that, therefore, either issue must be joined as to such new parties or their default taken, before the case is in a position to be brought to trial as to the parties already in.

All this is very true. Provision may be made in the order allowing new parties to be brought in to meet the various matters, or the order may simply allow them to be brought in, and the necessary amendments to be made to the summons and complaint, leaving the plaintiff to thereafter conduct his proceedings regularly at his own peril.

I am unable to perceive how, in any aspect of the case, the guardian of the infants is either a necessary or proper party. I therefore cannot grant leave to add him as a party.

Motion granted, so far as to give plaintiff leave to add parties defendant the executors of A. Schlucher, and to make the necessary amendments to the summons and complaint for that purpose.

No costs of motion. The order to be settled on one day's notice.

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COURT OF APPEALS.

DENNIS McMAHON, assignee of CHARLES T. HARRISON, plaintiff and appellant agt. THOMAS E. ALLEN, defendant and respondent.

1. Where facts are found by a referee in his report, on which judgment in conformity with the report is entered, in case the judgment is reversed at general term and new trial granted, but the findings are not interfered with by the general term in their decision, on an appeal to the court of appeals from such order granting a new trial, the latter court are not at liberty under section 272 of the Code to weigh the evidence, and to determine whether or not they should have reached the same conclusion as the referee.
2. Where a transfer of property real and personal, is obtained fraudulently and inequitably, by false representations made by the transferee to the transferer—by abuse of a fiduciary relationship—by practice on a reckless and improvident sailor—and where the transferer makes a subsequent conveyance of his property and causes of action to the plaintiff for the benefit of his creditors, by a voluntary assignment; such voluntary assignee may maintain in his own name a bill to set aside the first conveyance, as having been fraudulently and inequitably obtained.
3. The decision of the general term in New York, in this case (34 Barb. p. 56), on that point overruled. And the late case of *Dickinson agt. Burrell* (*Law Rep. Equity Series*, 1866, part 3, March, p. 887), approved of as a well considered case.
4. The case of *Prosser agt. Edmonds* (1 *Young & Coll. Eq. Rep.* 481), and *Nicoll agt. The New York and Erie Railroad Co.* 2 Kern. 121), explained and commented on.
5. The cases of *Livingston agt. Peru Iron Co.* (9 Wend. 511), and *Yates agt. Williamson* (1 *Law Rep. Eq. Series*, p. 528), approved of.
6. A person standing in a fiduciary relation to an heir or person entitled to property, cannot enter into any treaty for the purchase of that estate, without communicating to him every particle of information that he himself possessed with respect to its value.

On appeal from the First Judicial District.

THIS is an appeal from a decision of the general term of the first district, reversing a judgment entered on a report of the late William Kent, referee. The plaintiff, as assignee of Charles T. Harrison, for the general benefit of creditors, commenced a suit to set aside a conveyance to the defendant by said Harrison, of the latter's interest, derived under his mother's will, and to recover possession of the property, on the ground that it was obtained by fraud.

The referee decided that the conveyance was obtained by

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the defendant by fraud practiced by him on the said Harrison, to whom he stood in a fiduciary relation, and to whom he was indebted at the time of obtaining the conveyance, and who was a mariner in a distressed and needy condition, with reckless and improvident habits ; and that the conveyance was therefore void, and should be set aside.

The referee found certain facts, and arrived at the conclusions of law set forth in the opinion of this court.

The general term reversed the judgment on a pure question of law, viz : *that the assignment to the plaintiff by Charles T. Harrison, did not vest the plaintiff with the right to bring the action in his own name.*

The plaintiff below appealed from that reversal, under and pursuant to subdivision 2, of section 11 of the Code, and gave the stipulation therein provided.

The decision of the general term is reported in 34 *Barb. Rep.*, p. 561. This case has been before the supreme court several times on questions of practice. (See *McMahon agt. Allen*, 7 *Abb. Pr. R.* p. 1 ; 12 *Id.* p. 275 ; 14 *Id.* p. 220 ; 22 *How. Pr. R.* p. 193.)

DENNIS McMAHON, *in person.*

I. The assignment to the plaintiff below *was in form sufficient* to convey to him any right which Charles T. Harrison *could legally assign* to avoid his prior conveyance to the plaintiff below.

(a) It was general on its face, *of all the property real and personal, and rights of property real and personal*, and contained all the apt words required by law to pass real estate, viz : “ grant, bargain, sell and assign,” and was sealed, delivered and acknowledged. (*McKee agt. Judd*, 2 *Kern.* p. 622 ; *Waldron agt. Willard*, 17 *N. Y. R.* 466, *S. P.*)

(b) It directed the assignee in the first place to collect in, *sue for and recover*, the said property of said Charles T. Harrison.

The general term in their opinion, concede that the assign-

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ment in form would convey to the plaintiff the right of Charles T. Harrison, if it were assignable.

II. Irrespective of the power to assign a right to impeach the prior conveyance, the assignment was a conveyance of the *property of the assignor* to the present appellant, *as grantee or owner of the property*, the plaintiff has a right to sustain this action.

The objection to the assignment operating as a conveyance of the house in Houston street (which was the principal part of the property assigned), were—

(a) That it was an assignment of interest in lands, void by the statutes, relative to champerty and maintenance (2 *R. S.* 691, *O. P.* § 6).

(b) That it was a conveyance of lands held adversely, and, therefore, void by the statute (1 *R. S. O. P.* 739, § 147).

(a) As to the first objection : the general term below quote with approbation the rule that rights of entry are not assignable ; a brief reference to that rule and its reasons, and the decisions thereupon, will establish that this ground of objection is untenable in this case. (*See Coke on Lit.* 214 [§ b], § 347.) “Here *Littleton* reciteth one of the maxims of the common law, and the reason hereof is for avoiding of maintenance, suppression of right and stirring up of suits ; and, therefore, nothing in action entree or re-entree can be granted over, for so under color thereof, pretended titles might be granted to great men, whereby right might be trodden down, and the weak oppressed, which the common law forbiddeth, as men to grant before they be in possession.”

Nevertheless, *Coke* makes various diversities to this rule. The statute of 32 *Henry VIII* (*chap.* 34) ; 2 *Revised Statutes*, 505 (§ 30), however, extended the right of re-entry to assignees, grantees, &c., of the reversion, in cases of leases and of particular estates, as against the lessee, his heirs and assigns. And our statute of 1805, still further extended the assignability of leasehold estates, but now by our statute (1 *R. S.* 725, § 35), *expectant estates are descendible, devisable and alienable, in the same manner as estates in possession.* This rule of not assigning the right of re-entry, has been abroga-

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ted in Pennsylvania, as incompatible with our republican institutions, by *Stover* agt. *Whitman*, in 6 *Binney*, p.416.

And the late causes in our own courts, in effect, dispose of the reason of the aforesaid common law rule forbidding the transfers of the right of entry. The reason ceasing, the rule itself should cease. (*Thalhimer* agt. *Brinkerhoff*, 3 *Cow.* 633, *opin.* 648; *Gilleland* agt. *Failing*, 5 *Denio*, 308; *Mott* agt. *Small*, 20 *Wend.* 221 and 222; *Id.* p. 405; *Sedgwick* agt. *Stanton*, 14 *N. Y. R.* pp. 295 to 301; *Van Rensselaer* agt. *Read*, 26 *N. Y. R.* *opin.* 579.)

The provisions of the Revised Statutes relative to champerty (2 *R. S.* 691, *O. P.* § 6), do not apply to this case.

1st. The thing forbidden is the *buying* or *selling* of any *pretended right* or title to any lands, tenements or hereditaments.

The case as found by the referee below, is not one of a purchase of a *pretended right*, but is one of a *bona fide assignment* to the plaintiff as trustee, for the general benefit of creditors of a *valid estate*, whereof the assignor has been *defrauded* by the wrongful act of the defendant below.

2d. The statute forbids such sale unless the "grantor shall have been in possession * * * or have taken the rents and profits thereof for the space of one year before such grant."

5. Nevertheless, even if the conveyance were void by the doctrine of maintenance, yet by the following decisions the conveyance is good as between the plaintiff's assignor and the plaintiff. *It is only void as against him who hath right.* (*Van Hoesen* agt. *Benham*, 15 *Wend.* p. 164; *Keneda* agt. *Gardner*, 3 *Barb.* 593; *Livingston* agt. *Proseus*, 2 *Hill*, 528; *Cameron* agt. *Irwin*, 5 *Hill*, 282.)

The referee having found that the defendant's title was acquired *by fraud*, he, therefore, hath *no right* (*Crary* agt. *Goodman*, 22 *N. Y.* p. 177).

6. The case of *Nicholl* agt. *The N. Y. and Erie Railroad Co.* (2 *Kern.* p. 121), cited by the general term below, in deciding that a mere right of entry is not assignable, does not go to the extent claimed for it by the general term. It in effect decides that the mere possibility that an estate will

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be defeated by the breach of a condition subsequent, is not assignable ; although it holds that the grantor of the estate or his heirs, may take advantage of the breach. The court says, that a mere failure to perform a condition subsequent, does not divest the estate. The grantor or his heirs, may not choose to take advantage of the breach, and until they do so, by entry or by what is now made by statute its equivalent, there is no forfeiture of the estate. But the court say, what is meant by possibilities coupled with an interest, is of a very different character, as may be seen by reference to 4 *Kent*, 262, *O. P.*, and 13 *Wend.*, pp., 192, 193 and 194.

On referring to these authorities, the case in 13 *Wendell*, it will be found that every species of a possibility, if coupled with a vested interest in land, is descendible, devisable and assignable.

The late case of *Dickinson* agt. *Burrill* (*Law Rep. Equity Series*, 1866, *Part 3, Mar. p.* 337), is directly in point.

Apply these principles to the cause at bar ; it will be quite evident that Charles T. Harrison had the right to assign the property in question, so as to vest in the plaintiff the equitable estate in the property in controversy, and the right to recover it in the hands of the defendant.

The general term in their opinion say, that the deed given by Charles T. Harrison to the defendant was *voidable*, not void, and must so remain until declared so by the court ; and it cites several cases from *Johnson's Reports* sustaining that doctrine. On examining every one of these cases, they will be found to arise as between creditors of the grantor and a *bona fide* purchaser from the fraudulent grantee without notice, and have no precise application to our case at bar—wherein the assignor of the plaintiff is found by the referee to have been absolutely cheated out of his property by a fraudulent grantee, and the question arises between the assignee for general benefit of creditors of the party defrauded and the fraudulent grantee—no rights of a *bona fide* purchaser without notice, intervening or arising.

Chief Justice MARSHALL, in *Fletcher* agt. *Peck* (6 *Cranch*, 133), states the rule properly : If a suit be brought to set

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aside a conveyance obtained by fraud, and the fraud be clearly proved, the conveyance will be set aside as between the parties; but the rights of third persons, who are purchasers without notice, for a valuable consideration, cannot be disregarded. But it will be found by reference to *Anderson agt. Roberts* (18 *Johns.* p. 512), that the reason why *bona fide* purchasers are protected is because of the statute 13 *Elizabeth*, chapter 5, section 3 (2 *Rev. L.* 134). *Crary agt. Goodman* (22 *N. Y. R.* p. 177); *Livingston agt. Peru Iron Co.* (9 *Wend.* 511, 523); *Mead agt. Bunn* (32 *N. Y. R.* p. 275), hold that as between the parties, the fraudulent grantee has no title—the deed is a nullity. If then a nullity, Charles T. Harrison was rightfully the owner of the property assigned, and had the right to vest the plaintiff with the same, and the right to have his deed impeached.

(b) The second objection to the conveyance, viz: that the assignment to the plaintiff was void because it was a conveyance of lands, held adversely (1 *R. S. O. P.* § 147).

Under the findings (see same quoted in opinion), we submit that the defendant below could not maintain that he was under the term of the statute (1 *R. S. 739 O. P.* § 147), holding the property in controversy *under a title adversely to the grantor* (Charles T. Harrison), so as to avoid the latter's assignment to the plaintiff below.

1. *For a fraudulent title is not the basis of an adverse possession.* (*Livingston agt. Peru Iron Co.* 9 *Wend.* 511; *Crary agt. Goodman*, 22 *N. Y. R.* p. 170; *Woodward agt. McReynolds*, 1 *Chand. Nisi R.* 250; *Van Hoesen agt. Benham*, 15 *Wend.* 164.)

2. The defendant below standing in a fiduciary relation to the assignor, at the time he took the conveyance from him, in fact was his trustee, holding those lands in question subordinate to him (*Baker agt. Whiting*, 3 *Sum.* 475, 481 to 487).

3. Under sections 81 and 82 of the Code, such a holding is not an adverse possession.

IV. The case of *Livingston agt. Peru Iron Co.* (9 *Wend.* 511), was not overruled by the case of *Humbert agt. Trinity*

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Church (24 *Wend.* 610 and 635), as supposed by the general term below. (See *Crary* agt. *Goodman*, 22 *N. Y. R.* p. 177). SELDEN, J., in the latter case shows that the two cases are not antagonistic.

Irrespective of the question as to whether or not the assignment to the plaintiff was valid as a conveyance of the estate, we submit it was valid as a conveyance of a right in the plaintiff to avoid by action in his own name, the fraudulent conveyance on the defendant, because,—

V. The assignor of the plaintiff below could avoid his prior conveyance to the defendant below, in an action brought *by himself* to impeach the conveyance on the ground of its being obtained by fraud or covin.

(a) This is conceded by the general term. (See *opinion*, fol. 775 ; *Livingston* agt. *Proteus*, 3 *Hill*, 528, 529.)

(b) Fraud destroys the contract *ab initio*, and the fraudulent purchaser has no title (*Chitty on Contracts*, 406, 678, 681, *Am. ed.* of 1842). The deed is a nullity. (*Livingston* agt. *Peru Iron Co.* 9 *Wend.* 511-523 ; *Crary* agt. *Goodman*, 22 *N. Y. R.* p. 177 ; *observations of SELDEN, J.*)

(c) The referee found that the conveyance to the defendant below, was obtained by him by a fraud practiced on the plaintiff's assignor.

(d) A possession fraudulently taken, is unavailable to the party (6 *Wheat.* p. 580).

(e) In *Mead* agt. *Bruen* (32 *N. Y. R.* p. 275), the court held that a contract obtained by fraudulent means, though perfect in form is void in law.

VI. Charles T. Harrison then having the right to impeach his own conveyance, on the ground of its having been procured by fraud, we submit could assign the property so conveyed, and also a right to impeach the conveyance, and the view of the general term denying such right, is untenable.

(a) The following cases show that the assignment by Charles T. Harrison to the plaintiff below, would be good as between the assignor and the plaintiff, notwithstanding that the defendant was holding adversely to the assignor, and would authorize the plaintiff to maintain an action to set

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aside the prior conveyance, for his (the plaintiff's) benefit, which action the assignor could not discontinue. (*Livingston* agt. *Proteus*, 2 *Hill*, 528; *Cameron* agt. *Irwin*, 5 *Hill*, 282; *Kenada* agt. *Gardner*, 3 *Barb.* 593; *Lawrence* agt. *Bayard*, 7 *Paige*, 76.)

The general term below refer to this position, and do not dispute it. (See *Van Rensselaer* agt. *Read*, 26 *N. Y. R.* p. 379, observations by SELDEN, J.; *Main* agt. *Davis*, 32 *Barb. R.* p. 469.)

(b) It is therefore apparent that the true party in interest is the assignee, inasmuch as the fruits of the action would belong to him *as such*, and not to his assignor.

(c) Section 111 of the Code here interposes, and provides that the action *must be* brought in the name of the true party in interest. The subsequent clauses of that section as they now appear in the Code, were created by an amendment of the Code in 1862. We are to have this question decided by the provisions of the section 111, as it existed prior to that amendment.

(d) Section 113 provides that a trustee of an express trust may sue as plaintiff, without joining with him the person for whose benefit the action is prosecuted. An assignee for the general benefit of creditors, is a trustee of an express trust (*Cunningham* agt. *McGregor*, 12 *How.* 303).

The assignor and creditors are before the court by representation (*Mead* agt. *Mitchell*, 5 *Abb.* 106).

See *Hooker* agt. *Eagle Bank of Rochester* (30 *N. Y. R.* p. 83), which among other things hold that under the Code an assignment, valid as an equitable assignment, is equally valid at law. (*McKee* agt. *Judd*, 2 *Kern.* 622; *Brady* agt. *Burrill*, 1 *Abb.* 76; *Butler* agt. *N. Y. and Erie Railroad Co.* 22 *Barb.* 110.)

This last case cites and disapproves of 18 *Barb.*, 500; 17 *Barb.*, 468; 1 *E. D. Smith's R.*, 73. (*Field* agt. *The Mayor*, 2 *Seld.* 187; *Quin* agt. *Moore*, 15 *N. Y. R.* 432; *Meech* agt. *Stover*, 19 *N. Y. R.* 26.)

(e) A general assignment for the benefit of creditors, is considered a valid conveyance, founded upon a valuable con-

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sideration, and good against creditors proceeding adverse to it. (*Sewall* agt. *Marwood*, 9 B. & C. 300 ; *Nichols* agt. *Munford*, 4 Johns. C. 532 ; *McKee* agt. *Judd*, 2 Kern. 622.)

At any rate, the assignment here passed to the plaintiff below, the estate undisposed of to the defendant. If no estate was disposed of to the respondent Allen, by the first conveyance, because it was unfairly procured, then it was passed to the present appellant, by virtue of the general assignment, and the words of conveyance therein contained, who could test the *bona fides* of such first conveyance.

In the consideration of this point, we submit it is unnecessary to determine whether Charles T. Harrison could convey a title to the assignee of the land he had previously conveyed to the defendant below. It is sufficient to consider whether he could convey the right to impeach his prior conveyance.

The general term below, we submit, fell into a confusion on this subject. They held that the inability to convey the present possession of the land held adversely, operated so as to defeat the conveyance of the right to avoid the deed, the basis of the adverse title, which right, however, they admitted existed in the assignee, to assert in the name of the assignor. The right to impeach a conveyance on the ground of fraud, passes to the heirs, executors and devisees of the party defrauded.

This is conceded by the general term. If so, then such right is assignable.

VII. The defendant below was not holding these lands adversely at the time the said Charles T. Harrison assigned his property to the plaintiff, because the referee found as a matter of fact that the defendant stood in a fiduciary relation to the said Charles, with regard to said property, and in equity would be considered as holding it as his, said Charles' trustee, and not adversely to him. If so, there being no positive prohibition by any statute on the part of the said cestui que trust, conveying away such an equitable trust estate, the plaintiff would be vested with the proper title to search out

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and recover this trust property in the hands of the defendant below.

The late case of *Dickinson* agt. *Burrill*, reported in "*The Law Reports*," *Equity Series*, 1866, *Part 3*, *Mar.* page 337, is directly in point.

Baker agt. *Whiting* (3 *Sum.* p. 475, *opin.* 481 to 487), is directly in point.

VIII. The case of *Prosser* agt. *Edmonds* (1 *Young & Coll. Exch. R.* p. 481), does not apply to this case.

That was a case of assignment by A., who was entitled to certain property under his father's will (all of which was personalty), for a valuable consideration to B., excepting a reversionary interest in certain funds; afterwards A. assigned the whole of his interest under his father's will, including said reversionary interest to C. It was held that C. could not maintain a bill to set aside the first assignment, on the ground of fraud committed by B. against A., the latter of whom refused to join as plaintiff in the suit, *and made no complaint about the fraud*. The court appear to put their decision on the statutes relative to maintenance (32 *Henry VIII*, ch. 9), re-enacted in our Revised Statutes, and that the assignment of choses in action was against the policy of the law against the sales of right to litigate. The court also lay great stress on the fact that the assignor made no complaint of the instrument sought to be set aside, and refused to be made a party to the suit. This decision, if sustained in our courts, would put an end to a vast number of suits founded on rights to personalty acquired by assignment, and sought to be sustained by the assignees. It is founded on no authority excepting the case of *Wood* agt. *Downes* (18 *Ves.* 120), which so far from supporting it, rather overthrows it; for in that case the Lord Chancellor ELDON allowed, as between attorney and client, a deed claimed to be against the policy of the law as to maintenance and champerty, to stand as security for what was actually due, and the purchase by the attorney to be considered a trust. The case cited does not apply to ours.

It is a decision which is founded on the exceeding dislike

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of the English courts to recognize assignments of choses or rights in action.

As the general term reversed the judgment below solely on the ground that Charles T. Harrison did not convey any right to the plaintiff below to sue in his own name, if they were in error, we are entitled to have their order granting a new trial reversed, and the previous judgment of the referee sustained.

ALBERT MATHEWS, *for respondent.*

I. The appeal taken by the defendant to the general term of the supreme court, from the orders and judgment entered upon the referee's report, brought up for review numerous exceptions taken at the trial, to the exclusion of proper, and admission of improper evidence; also numerous exceptions taken after judgment to separate conclusions in the referee's report.

All of these exceptions were before the court below, and were argued and considered. If any one of these exceptions were well taken, the decision of the inferior tribunal in granting a new trial was correct, and this court must affirm the order; and under the stipulation (given on taking this appeal), the defendant must have final judgment absolute in his favor. It is wholly immaterial to this court upon what particular point or exception the case was decided in the lower court, or what particular reasons any member of that court may have had or given for his opinion. It is quite enough for this court to know that an order for a new trial was properly granted. Any other rule of procedure here, would leave a respondent (on an appeal from an order granting a new trial) in a worse predicament than if the court below had affirmed the judgment, and he had himself appealed, as in that case he would undoubtedly have a right of reversal for any error committed by the referee to his prejudice (*Titus agt. Orvis*, 16 N. Y. R. p. 618).

II. The defendant's appeal to the general term of the supreme court, also brought up for review all the *material*

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conclusions of fact found by the referee. Nearly all of these conclusions of fact were excepted to as *erroneous*. If this court will examine the evidence, these *conclusions of fact* will be found not only unsupported by any reliable proof, but entirely disproved by overwhelming evidence. The court will not, however, examine the evidence to find grounds for reversal of the order granting a new trial. The appeal from the order concedes to the defendant "every conclusion of fact, which is supported, however slightly, by the evidence" (*Hoyt agt. Thompson*, 19 N. Y. R. p. 212). This appeal does not otherwise bring up for review any question of fact (*Id.* p. 207). This court must affirm the order, "if it can stand consistently with any view to be taken of the evidence given at the trial." (*A. D.* 1859, *Miller agt. Schuyler*, 20 N. Y. R. p. 522; *A. D.* 1861, *Sandford, Administrator agt. Eighth Av. R. R. Co.* 23 N. Y. R. 343; *A. D.* 1864, *Macy agt. Wheeler*, 30 N. Y. R. p. 237; *A. D.* 1864, *Bergen agt. Wemple*, 30 N. Y. R. p. 319.)

III. The counsel here discussed the facts at great length, and maintained that this court could review these findings of the referee sufficiently to find matter whereon to determine that the order of the general term granting a new trial was proper.

IV. The supreme court properly granted a new trial, because also of errors in matters of law committed by the referee, in respect to the legal effect of the assignment made by Charles T. Harrison to the plaintiff. No part of the subject matter of the conveyance made by Harrison to the defendant in *March*, 1852, passed to the plaintiff under the assignment made ostensibly for the benefit of creditors in *August*, 1852.

1. The plaintiff being a mere *voluntary assignee*, he could not be heard (before the act of 1858), to impeach the conveyance of Harrison to Allen, as fraudulent against creditors, if any, of Harrison (*Van Heusen agt. Radcliff*, 17 N. Y. R. 580).

2. The assignment to plaintiff could not pass any interest Harrison might have claimed in the Houston street property.

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He was out of possession, and defendant was in full possession. At the worst, Harrison's conveyance to Allen was merely *voidable*, and not void. Even if Harrison had attempted by specific conveyance to transfer a claim to right of possession thereof, or title thereto, such conveyance would have been void by the prohibition of the statute against champerty. (1 *R. S.* p. 739, § 147; *Burhans* agt. *Burhans*, 2 *Barb. Ch. R.* p. 408; *Lowber* agt. *Kelly*, 17 *Abb. R.* 458; *Lowber* agt. *Kelly*, 9 *Bosw. R.* 494; *Howard* agt. *Howard*, 17 *Barb. R.* 665.)

(a) The decision in the case of *Livingston* agt. *The Peru Iron Co.* (9 *Wend. R.* 512), is based upon the fact that the deed there in question was absolutely *void in fact*, for want of authority in those who executed it (*Humbert* agt. *Trinity Church*, 24 *Wend. R.* 636).

3. The assignment to the plaintiff on its face does not purport to convey any right of Harrison, to impeach his conveyance to the defendant. The absence of any reference in it to the conveyance to defendant, is conclusive evidence that Harrison did not intend thereby to confer upon plaintiff any right to disturb the contract made with the defendant (*Strong* agt. *Strickland*, 32 *Barb. R.* 284).

V. The plaintiff in this action is not in a position to ask the equitable interference of the court, in the same manner as Charles T. Harrison might have done, if a wrong were done to him.

1. Charles T. Harrison makes no claim in this action.

2. This is not the case of an aggrieved heir asking to be restored to an estate he has sold.

3. Harrison was not selling an expectancy, and his conveyance to Allen does not fall within the rule making such sales liable to be avoided. The subject matter of the sale to defendant was a present estate in possession, and the settlement of a suit commenced to recover it.

5. The referee erred in directing the assignment to Allen to be set aside entirely.

1. At least, it was good beyond the extent of any valid

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creditors of Charles T. Harrison who might claim under the assignment to the plaintiff.

2. Besides, the revocation of September, 1852, was valid to sustain Mr. Allen's right to any surplus, and could not be impeached to this extent by the plaintiff here, nor in any action in which Charles T. Harrison was not a party. (*Waterbury agt. Westervelt*, 5 *Seld. R.* 598.)

3. The Code of Procedure prohibits such an action as this in the name of the plaintiff (*Code of Pro.* § 111).

VI. Assuming all the plaintiff's allegations to be true, his pleadings and evidence failed to establish a cause of action upon which a suit could be maintained *in his own name* against the defendant. No right of action could accrue to the plaintiff, by assignment of Harrison, to institute this action to set aside the conveyance by Harrison to defendant as voidable, for the reasons alleged in the complaint, or sought to be proved on the trial. Whatever right Harrison had was a "naked claim to commence an equitable action" for an alleged imposition upon Harrison himself personally. It was "a naked claim to upset a legal instrument." It was a *privilege personal* to Harrison, "an unrecognized claim, of which there was no possession or capability of assignment." He will be presumed to have waived it, unless there be evidence of an intention to the contrary by his instituting an action himself to enforce it. (*Prosser agt. Edwards*, 1 *Young & Coll. Exch. R.* 81; *Story's Eq. Jur.* § 1040 *g. and note* 5; *Thurman agt. Wells*, 18 *Barb. R.* 515.)

1. This claim of Harrison was no better than a *right of re-entry* upon lands for forfeiture by condition broken, which has been often held not to pass by assignment. (*Rice agt. Stone*, 1 *Allen's R.* 566; *Trask agt. Wheeler*, 7 *Allen's R.* 11; *Nicoll agt. N. Y. & Erie R. R. Co.* 2 *Kern. R.* 121.)

2. It was no more assignable than a cause of action for *deceit*, or a right to cancel securities for usury. (*Greene agt. Morse*, 4 *Barb. S. C. R.* 332; *Murray agt. Judson*, 9 *N. Y. R.* 84; *Boughton agt. Smith*, 26 *Barb. S. C. R.* 635; *Zabris-
kie agt. Smith*, 3 *Kern. R.* 322; *Bullard agt. Raynor*, 30 *N. Y. R.* 230.)

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VII. The counsel here discussed at much length many exceptions to evidence taken by him on the trial below, and contended that the general term below would have been authorized to have granted a new trial on those exceptions.

VIII. The order granting a new trial should be affirmed, and judgment absolute ordered for the defendant, with costs.

HUNT, J. On the 22d of March, 1852, Charles T. Harrison was the owner of a life estate in No. 694 Houston street, New York, as tenant in common with his brother Samuel. At the same time the defendant was indebted to the said Charles in the sum of \$500, for moneys received by him belonging to said Charles, from the surplus of the sale of No. 14 Charles street, and for rents of said premises in Houston and Charles streets, collected by said defendant while assuming to act as agent for the said Charles T. The said Charles also had an interest in certain trusts under his mother's will, which, under some circumstances, might be of value. He was at this time a mariner; had been such for seven years previously; was reckless, improvident, unacquainted with business as transacted on land; easily led and persuaded to do foolish things; was needy and in want. At and before the time mentioned, the defendant stood in a fiduciary relation to said Charles, from having acted as his agent in collecting the rents and surplus interest, as above mentioned, and had also been the agent of the executor of his mother's estate, who was also trustee of personal property directed to be invested for the benefit of Charles T. and his brother Samuel.

On the day mentioned, the defendant, by unjust and inequitable means, obtained from the said Charles T. Harrison a conveyance of all the lands, tenements, claims, demands, bonds and money, belonging to him as devisee, legatee or appointee of his mother, or as one of her heirs-at-law, describing particularly certain interests and certain lands.

Charles T. Harrison was then ignorant of business, and of the value and situation of his property; unacquainted with the state of accounts between himself and the defend-

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ant ; unable himself to investigate them, and had no counsel to advise or assist him. The defendant knew all these facts ; knew him to be reckless, improvident and dissipated, and did not disclose to him the state of his affairs, but concealed them, and drew him into making the above conveyance, the consideration of which was grossly inadequate, and the defendant's conduct in obtaining the deed was inequitable and fraudulent. The actual value of the estate so conveyed was at least \$2,300, and under some contingencies it would have been more valuable. The amount paid by the defendant to said Charles T., was about \$1,100, of which \$700 was in money, \$150 in a gold watch, and \$250 was paid to the defendant's counsel, for which the said Charles T. received no benefit whatever. At the time of the said conveyance, Charles T. was indebted to the amount of \$600, and his creditors are prejudiced by the conveyance aforesaid.

On the 3d of August, 1852, the said Charles T. Harrison made an assignment to the plaintiff for the benefit of creditors, of all his property and rights of action, with full powers to sue for and collect the same.

On the 3d of September, 1852, the defendant, by further fraud and imposition, obtained from the said Charles T. a writing attempting to revoke the above assignment to the plaintiff.

The facts stated are as found by the referee in his report, and there is evidence to sustain them. They are not interfered with by the supreme court in the judgment given by it, and are obligatory upon us. We are not at liberty to weigh the evidence to determine whether we should have reached the same conclusion (*Code*, § 272). Upon the above facts, the referee directed the setting aside of the conveyance to the defendant of March 22, 1852 ; that an accounting be had by said defendant of the moneys, rents and interests received by him, and judgment was entered upon his report in favor of the plaintiff, with costs.

The defendant appealed from this judgment to the general term of the first district, where the judgment of the referee was reversed on the sole ground, as stated in the opinion,

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that the cause of action could not be transferred by Harrison, so that an action could be maintained upon it in the name of the plaintiff.

A transfer of property, real and personal, is obtained fraudulently and inequitably, by false representations made by the transferee to the transferer, by abuse of a fiduciary relationship, by practice upon a reckless and improvident sailor. The transferer makes a subsequent conveyance of all his property and causes of action to the plaintiff, for the benefit of his creditors. Can the plaintiff maintain an action in his own name against the first transferee to set aside the conveyance to him, as having been fraudulently and inequitably obtained, and by an abuse of a fiduciary relationship?

In the recent case of *Dickinson* agt. *Burrill*, this precise question was presented. (*See the Law Rep. Eq. Series*, 1866, Part 3, March, p. 337.) James Dickinson and others, made a conveyance of their respective shares of the real estate of George Whitebeard, deceased, to John Edens, which was liable to be set aside on the equitable grounds, viz: that Edens was acting as solicitor for Dickinson in relation to the Whitebeard estate; that the consideration was inadequate; that Dickinson was in indigent circumstances, and ignorant of the value of property conveyed. Dickinson subsequently made a voluntary settlement of the same property, in trust for himself for life, with remainder to his children, as he should appoint, and in default of appointment, to all his children who should attain twenty-one years of age, or being daughters, should marry, in equal shares. The bill was filed by five of Mr. Dickinson's infant children, to set aside the conveyance to Edens as to their portion of the estate. The other three children, the trustees of the settlement and Edens, were the defendants in the suit. Mr. Dickinson was not a party. Edens demurred to the bill for want of equity. Mr. Selwyn, Q. C., Mr. Jessel, Q. C., and Mr. Hemmings, in support of the demurrer, claimed that the plaintiffs could not institute the suit, arguing that at the time of making the voluntary settlement Mr. Dickinson had parted with all his interest in the property for a valuable con-

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sideration, and that the settlements, therefore, conveyed nothing but the right of suit to set aside the previous conveyance, which was contrary to public policy on the ground of champerty, and not to be supported in equity. They further argued, that if a *bona fide* conveyance would authorise the suit, it was otherwise with a voluntary settlement, which the settler could at any time avoid by a subsequent conveyance for value. Mr. Southgate, Q. C., and Mr. Webb, in support of the bill, argued that there was no rule in equity prohibiting the sale of property which the assignor was entitled to recover by suit; that the right of suit was incidental to the right of property, and did not affect the right to assign it. The demurrer was overruled, with costs.

LORD ROMILLY, M. R., deciding the case, said: "Upon the allegations contained in the bill, I am of the opinion that a case is made out, upon which if proved as there stated, this court would give relief at the instance of the proper persons. The only question, therefore, that I have to determine is, whether by reason of the deed of April, 1864, the plaintiffs have a right to ask for that relief which their father, the settler, and the trustees of the settlement, have refused or declined to concur in asking for such relief." He proceeds: "assuming the deed of April, 1864, to have been executed for value, then the right of suing is incidental to the conveyance of the property, and passed with it; that is, if James Dickinson had thought fit, after the sale to Edens in 1860, to sell the same property to A. B., saying that the previous sale was a fraudulent one, and though he himself would not take any steps to set it aside, yet if A. B. thought fit to do so he might, and that he would sell his interests in the property to A. B., for a sum of money then *bona fide* agreed upon, in such a case, in my opinion, A. B. could have maintained the suit. The distinction is this: If Dickinson had sold or conveyed the right to sue to set aside the indenture of December, 1860, without conveying his interest in the property which is the subject of that indenture, that would not have enabled the grantee, A. B., to maintain this bill, but if A. B. had bought the whole interest of James Dickin-

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son in the property, then it would. The right of suit is incidental to the property conveyed, nor is it, in my opinion, a right which is only incidental to the property when conveyed as a whole, but is incidental to each interest carved out of it."

He then considers the point that the conveyance was voluntary, and whether that fact alters or affects this right to sue, and says: "I am of the opinion that it does not.

* * * Assuming a voluntary deed to be complete, *bona fide* and valid, and unaffected by a statutory disability, I know of no distinction between such a deed and one executed for valuable consideration. The estate and limitation created in such a deed have the same operation and effect as in a deed executed for value, and must be construed in the same manner, and it carries with it all the same incidents and rights attached to the property conveyed as are carried by a deed executed for value, and the grantee in this respect stands in exactly the same situation as if he had paid value for the property conveyed."

This was a well considered case; is of high authority and, in my opinion, is an accurate exposition of the law. I think it should control the present case.

The Oneida Bank agt. *The Ontario Bank* (21 N. Y. R. 490, 498), and *Tracy* agt. *Talmage* (14 N. Y. R. 192), were cases similar in principle to the present. In the former case, the Ontario Bank had issued certain post-dated drafts, which are held to be within the prohibition of the statute against bills or notes not payable on demand. Assuming such draft to be void, it was held that the party who received them upon a loan of money to the bank, was entitled to the money advanced by him, either upon the basis of a contract of loan, treating that as valid, and rejecting the illegal security, or upon a disaffirmance of the contract as for money had and received. It was further held, that the discount of such a draft by the Oneida Bank for Perry, the original lender, and the transfer of the same by him to the Oneida Bank, the plaintiff gave to such transfer the same rights of action against the Ontario Bank that Perry had; the court says: "He who sells a security and receives his pay for it, neces-

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sarily sells whatever claim or right the security is understood by the parties to represent."

In *Tracy* agt. *Talmage*, the Morris Canal and Banking Company had received certain post notes which were held to be void. The Morris Company transferred \$196,000 of such notes to the state of Indiana. The consideration for the post notes was certain state stocks delivered to the banking association issuing the same, and the question among others was, whether the state of Indiana was entitled to recover that consideration, the notes being considered void. There was no pretense that anything except the notes had been transferred in form, but it was held that the state was in equity the assignee of the demand which the notes professed to represent, and was entitled to recover the value of the stocks. (*See* 21 N. Y. 499.)

In *Waldron* agt. *Willard* (17 N. Y. R. 466), the firm of Bourn & Co. executed to the plaintiff a writing that "we have this day sold to M. R. Waldron all our interest in the goods sunk by the boat *Wyoming*," with certain other particulars. It appeared that in the April preceding, Bourn & Co. had shipped the goods in question by the defendant's boat on the Hudson river; that the boat was sunk, and after being fifty-five days under the water, it was raised, the goods on board was taken out and sold for the benefit of the line. These facts were known to both parties to the bill of sale; it was held by this court that the above sale operated as a valid assignment of the rights of action against the carrier for the non-delivery of the goods.

The case of *Prosser* agt. *Edmonds* (1 *Young & Co.* 481, &c.), is cited as an authority in opposition to the doctrine. I have stated I do not understand the question at issue to have been invalid in that case, or that it was intended to have been decided by Lord ABINGER. He says that when a party assigns his whole estate, and afterwards makes an assignment of the same estate generally to another person, and the second assignee claims to set aside the first assignment as fraudulent and void, the assignor making no complaint of fraud, the right of the second assignee to make

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such a claim, would be a question deserving of great consideration. He expresses his present impressions as against the right, and illustrates his idea by suppositions which are at variance with the principles established in the cases in our courts.

Lord ROMILLY says in *Dickinson* agt. *Burrill* (*supra*), "that the case before us does not fall within the rule established by that decision of *Prosser* agt. *Edmonds*."

Nor is this case in principle like that of *Nicoll* agt. *The New York and Erie Railroad Company* (2 Kern. 121). The decision there was, that when land was conveyed with a condition subsequent, a mere failure to perform the condition does not divert the title, but there must be an entry, or what is equivalent by statute, by the grantee or his heirs, and that this right of entry did not pass by a conveyance of the land. This was the express ground that the conditions subsequent were reserved for the benefit of the grantor and his heirs solely, and that no other person could take advantage of the breach. Of a similar character are the usury cases sometimes cited, which holds that the defense is a personal one, and that none but the borrower technically, or his personal representatives, can set up the defense. In regard to an adverse holding by the defendant at the time of the execution of the assignment, the case of *Dickinson* agt. *Burrill*, as well as that of *Livingston* agt. *The Peru Iron Co.* (9 Wend. 511), show that such defense is not available, where the holding was under a deed fraudulently obtained. In the latter case, it appeared that Livingston made a voluntary conveyance to his sons of a large tract of land in Clinton county. The sons filed a bill against the defendants, alleging that their purchase was obtained by fraudulent misrepresentations as to the character and value of the land. The defendants demurred, on the ground that they were in possession of the land at the time of his conveyance by Livingston to his sons, by virtue of the deed under which they claimed. The court of errors held against the demurrer, deciding that possession under a deed fraudu-

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lently obtained, could not be deemed adverse, so as to avoid the deed of the plaintiff.

The court below, in my opinion, were in error in holding that the assignment to the plaintiff did not authorize the suit brought by him in his own name. The evidence of abuse of the confidence arising from a *fiduciary* relation, brought the case within the principle of *Yates* agt. *Williamson* (1 *Law Rep. Eq. Laws*, p. 528), which was shortly this: "A nephew of a former trustee of B.'s property, being commissioned by his uncle to advise B., a young man aged twenty-three, of intemperate and extravagant habits, in the settlement of his college debts, which amounted to £1,000, and to advance him £500 for the purpose, offered to give him £7,000 for his undivided moiety of an estate under which there were coal mines, the working of which had been discontinued for fifteen years; pending the negotiation, A. obtained from C., a mining engineer, an estimate putting the value of the minerals under the entire estate at £20,000. A separate solicitor was employed for B. at A.'s suggestion, and before completing the bargain A. urged B. to consult his father (with whom he was not upon good terms). A. did not communicate to B. the valuation of the engineer, nor did he suggest to him to consult a mineral engineer. B. accepted A.'s offer of £7,000, and died shortly after executing the conveyance. On bill by B.'s administrator to set aside the purchase: *held*, that such a fiduciary relation existed that the suppression from B. of the engineer's valuation, rendered it impossible for the courts to sustain A.'s purchase. Sir A. PAGE, V. C., says: "The broad principle on which the court acts in cases of this description is, that wherever there exists, such a confidence of whatever character that confidence may be, as enables the person in whom confidence or trust is reposed, to exert influence over the person trusting him, the court will not allow any transaction between the parties to stand, unless there has been the fullest and fairest explanation of every particular resting in the breast of the one who seeks to establish a contract with the person so trusting him. * * * The young man

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having then said that he was determined to dispose of his property, it was absolutely impossible for Robert Williamson, filling as he did that position of confidential adviser, to enter into any treaty for the purchase of that estate, without communicating to him every particle of information that he himself possessed with respect to its value."

The judgment of the general term should be reversed, and that of the referee affirmed, with costs.

Concurred in by all the members of the court.

NEW YORK SUPERIOR COURT.

THE MADISON AVENUE BAPTIST CHURCH agt. THE BAPTIST CHURCH IN OLIVER STREET.

The allegations of the *petition of a religious corporation*, presented to the court for an order to sell and convey their real estate, which states that their receipts and income are insufficient either to provide for the payment of their liabilities, or to meet current expenses, is not to be deemed *untrue* where it is shown that the current expenses and interest account of the corporation run behind their receipts and income, at the rate of \$3,000 per year, even if it is claimed that a great part of the indebtedness of the church is held by members of the church, who have never called for interest upon such indebtedness—they never having released their right to claim interest.

Where such petition alleged that the plan or terms of the projected union (of the two churches, plaintiffs and defendants) being agreed on by a joint committee appointed by the *corporate bodies* respectively, it is not to be deemed untrue, so as to deprive the court of jurisdiction, where it appears that at a corporate meeting the plaintiff's corporation (who allege the invalidity of the appointment), adopted and ratified the action of its *committee* appointed to confer with the committee appointed by defendants, which agreed on the plan in question. In such case the matter stands as if the plan of union had, without the intervention of a committee, been proposed in the first instance at such corporate meeting, and then adopted.

To constitute a corporate meeting, whose acts and resolution shall be binding, there need not be present a *majority of all the corporators*. Where the corporators are indefinite, such of them as assembled pursuant to regular call, will constitute a quorum for the transaction of business, and a *majority of said quorum* can pass a resolution.

The fact that some persons were present at the meeting who *were not corporators*, will not vitiate the proceedings of the meeting, unless it appears that such persons voted, and that their votes were necessary to carry the resolutions which were passed.

Whether the number of *pew holders* was more or less than the number stated in the

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petition, was of no consequence, since the allegation as to consent of the pew hirers might be stricken out of the petition without affecting the jurisdiction of the court.

Where, although it might be that a majority of the whole number of the plaintiff's *corporators* did not affirmatively authorize the proceedings, yet the evidence did not show that more than four or five objected. The corporate meeting was, therefore, ample authority for the *trustees* to make the application to the court; and the trustees having under that authority, passed a resolution directing the application to be made, it was unnecessary to show an authority by a majority of the whole number of *corporators*.

Heard Special Term, October, 1866. Decided January, 1867.

UPON a former trial of this action, there were four objections raised to the order made by the supreme court, authorizing the conveyance by plaintiffs to defendants of the property in question.

Those four objections were :

First. That the court had the power to order only a sale.

Second. That the application was made by the trustees and not by the corporation.

Third. That the order did not direct the application of the money arising from the sale.

Fourth. That the transaction produced a dissolution and abandonment of the plaintiff's corporation, and not a continuance of it for the purposes of its organization.

The justice before whom the former trial was had, held these objections to be valid, and excluded evidence of such supreme court proceedings. Judgment was consequently rendered for plaintiffs. Upon an appeal from such judgment, the general term held that each one of said four objections was untenable, reversed the judgment and ordered a new trial, on the ground that error was committed in not admitting in evidence the record of the supreme court proceedings (*Reported 30 How. Pr. R. 455*).

C. C. LANGDELL and J. T. BRADY, *for plaintiffs.*

WM. R. MARTIN, W. F. ALLEN, and

I. B. WOODBUFF, *for defendants.*

JONES, J. The new trial thus ordered, came on before me.

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The general term has decided that the allegations in the petition, if true, are sufficient to give the supreme court jurisdiction and authority to make the order in question.

On the trial before me, however, plaintiffs introduced testimony with the view of showing that divers of the allegations of the petition were untrue, and claimed that if these allegations were untrue, the supreme court obtained no jurisdiction.

The allegations respecting which evidence was given, are :

First. As to the inability of plaintiffs' corporation to pay the liabilities, or meet the current expenses of the church.

Second. As to the plan or terms of the projected union being agreed on by a joint committee appointed by the corporate bodies respectively.

Third. As to whether there were a sufficient number of corporators present at the meeting of September 29, 1862, to make the action of that meeting binding.

Fourth. As to there being twenty-eight pew owners and thirty-nine pew hirers.

Plaintiffs claim that the allegations of the petition in these respects are untrue. I will examine the proof.

<i>First.</i> The current expenses of the church were,	\$4,800.00
Interest on the mortgage debt.....	4,235.00
	<hr/>
	\$9,035.00
Receipts from all sources.....	5,900.00
	<hr/>
	\$3,135.00

In addition to this, there were liabilities not secured by mortgage (some of them in litigation),

amounting to about..... \$12,000.00

Thus we have an annual excess of current expenses over receipts of \$3,100; and liabilities (not secured by mortgage) amounting to \$12,000. There was no income to meet this excess, and pay off this liability. There were no funds, and no resources, other than a resort to a sale or mortgage of the church edifice, wherewith to provide for the payment of the liability, and for the keeping down of this excess.

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Under this state of facts, I think it may well be said, in the language of the petition, "that they are unable to pay their liabilities, or meet the current expenses of the church."

There is no doubt that by a sale of the church property, funds sufficient to meet the liabilities could be obtained. One of the objects of the application was, by the union of the two churches, the conveyance of the plaintiffs' property to defendants, and the bringing in of the defendants' property, to provide for the payment of these liabilities, and so to increase the prosperity of the united church, as that the current receipts would keep down the current expenses, including therein interest on the mortgage debt.

The petitioners do not say that their property if thus sold, would not be sufficient to discharge their liabilities; all they say is, that their receipts and income are insufficient, either to provide for the payment of their liabilities or to meet current expenses.

I think the proof sustains this allegation. Indeed, if they kept on for a period of years running behind in their current expenses and interest account, at the rate of \$3,000 a year, the result would be that after a while the proceeds of a sale would not discharge their liabilities.

The plaintiffs claim that as a great part of an indebtedness of \$18,000 is held by members of this church, who have not called for interest, such interest cannot be regarded as a liability. This indebtedness is, however, secured by bonds bearing interest on their face. The holders have never released their right to claim interest, and can at any time call for the payment of current as well as back interest.

Second. The evidence shows that the committee appointed by plaintiffs to confer with a committee of defendants, was not appointed by the *corporate body*.

I do not, however, perceive that the jurisdiction of the court depends in any degree on this allegation. The only question in this respect is, whether at a corporate meeting the plaintiffs' corporation adopted and ratified the action of its committee. If so, then the matter stands as if the plan of union had, without the intervention of a committee, been

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proposed in the first instance at such corporate meeting and then adopted. The plan in question was adopted at an alleged corporate meeting of plaintiffs' corporation. This brings me to the consideration as to whether the action of that meeting was binding.

Third. There were but twenty corporators present at that meeting, far less than a majority of all the corporators.

The plaintiffs claim that to constitute a corporate meeting, whose acts and resolution shall be binding, there must be present at least a majority of all the corporators.

I think not. Where the corporators are indefinite, as in this case, then such of them as assemble pursuant to regular call, will constitute a quorum for the transaction of business, and a majority of said quorum can pass a resolution.

It is objected that some persons were present at the meeting who were not corporators.

That fact will not vitiate the proceedings of the meeting, unless it appears that such persons voted, and that their votes were necessary to carry the resolutions which were passed.

Fourth. The evidence sustains the allegation that there were but twenty-eight pew owners. As to whether there were more than thirty-nine pew hirers, does not satisfactorily appear on the evidence. The records of the church seem to have been loosely kept, inasmuch as no record of pew owners or of pew hirers, containing appropriate data as to when the parties became such owners and hirers, and as to when they ceased to be such, was produced in evidence.

The evidence as to the number of pew hirers, consists in the recollection of witnesses, aided by entries of payments for pew rents, giving the dates and amounts of the payments, with the number of the pew, and the name of the person paying, without indicating for what period of time the payments were made.

I think this evidence is insufficient to overcome the statement in the petition, verified by the president and secretary of the board of trustees, at a time when the facts must have

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been fresher in their minds than they could possibly have been in the minds of the witnesses at the trial.

Whether the number of pew hirers was thirty-nine or fifty-two, is not important, since the allegation as to consent of the pew hirers may be stricken out of the petition without affecting the jurisdiction of the court.

A great amount of evidence was taken as to the number of the corporators of plaintiffs' corporation. I have deemed it unnecessary to determine the number, for although it may be that a majority of the whole of the members did not affirmatively authorize the proceedings, yet the evidence does not show that more than four or five objected. If I am right in my view that the resolution of the meeting of 29th September, was ample authority for the trustees to make this application, then the trustees, having under that authority, passed a resolution directing the application to be made, it is unnecessary to show an authority by a majority of the whole number of corporators. If it appeared in evidence that a majority of the whole number objected to the application being made, then other questions would arise, which it is now unnecessary to discuss.

I have thus considered all the grounds arising out of the evidence *dehors* the supreme court record, upon which it is claimed that that court had no jurisdiction, and have come to the conclusion that the claim of no jurisdiction is untenable on any one or all of such grounds.

Plaintiffs' counsel, however, claims that the insertion in the petition of the allegations just considered, operated as a fraud on the supreme court, and, therefore, the order in question was void.

The evidence before me establishes the truth of all the allegations except two. One of these two is the allegation as to the number of pew hirers. On this I have held that the evidence is too unsatisfactory for me to decide against the truth of the petition. The other is the allegation that the committee appointed by the plaintiffs was appointed by the corporate body. The evidence shows a committee was appointed by plaintiffs; that said committee conferred with

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a committee appointed by defendants, and agreed on the plan in question. It was a mere mistake, and perhaps an error of judgment, in stating that the committee was appointed by the corporate body. The mistake is too immaterial to justify a holding that by reason thereof, the order is void, as having been obtained by fraud.

There certainly was no fraud intended, and, so far as I can see, no actual or legal fraud has been shown.

Entertaining these views, it is not necessary to consider whether, after a party has acted in good faith upon an order made by a court upon the application of the trustees of a corporation, such corporation can claim the order to be void by reason of its trustees having committed a fraud on the court; or the more general question, whether one court has any right to hold the judgment or orders of another court to be null and void by reason of a deceit having been practiced on that court, or if they have any such right, then under what circumstances, or in whose favor, it is to be exercised.

Judgment for defendants, with costs.

COURT OF APPEALS.

THE GOVERNORS OF THE ALMSHOUSE OF THE CITY AND COUNTY OF NEW YORK agt. THE AMERICAN ART UNION.

The 11th section of the 7th article of the constitution of 1821, is in these words:

"No *lottery* shall hereafter be authorized in this state; and the legislature shall pass laws to prevent the sale of all lottery tickets within this state, except in lotteries already provided for by law." The latter clause of the 10th section of the 1st article of the constitution of 1846, is in these words: "Nor shall any *lottery* hereafter be authorized, or any sale of lottery tickets allowed within this state."

Payment of the prizes *in money*, is not one of the essential ingredients of a lottery.

Whenever the scheme of distribution is such that if the payment of the prizes were in money it would be a lottery, it will be equally so, although the prizes are payable in *lands or chattels*.

The intention of the framers of the constitution undoubtedly was to forbid the future granting of any such lotteries as had at any time previously been authorized by law, and by requiring the legislature to pass laws to prevent the sale

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of all lottery tickets, to put an end to all such distributions of money or goods, by lot or chance, as had heretofore been forbidden by the statute, under the name of private lotteries.

The *American Art Union* was originally incorporated by the name of the Apollo Association, with power, among other things, of making such a constitution, by-laws and regulations, as they should judge proper for certain enumerated purposes.

The corporation made and adopted a constitution on the 29d of December, 1843, and by its tenth section it was provided that at the annual meetings of the association in December, the works of art purchased during the year should become by lot, publicly determined, the property of individual members, each member being entitled to one chance or share in such distribution, for each five dollars by him subscribed and paid.

By the first section of the act of January 29, 1844, the name of the Apollo Association was changed to "The American Art Union." The second section stated that: "The distribution of the works of art belonging to the association, provided for in the constitution thereof, and the annual election of officers, shall be held on the Friday preceding the 25th day of December in each year, instead of the time stated in the fourth section of the act hereby amended."

Held, that the scheme of the association formed under their constitution and by-laws, for the sale and distribution of its works of art was a *lottery*, within the meaning of the constitution, and the legislature had no power to authorize or sanction it. Consequently an action against them to recover the statute penalty, given for violating the laws against lotteries, was properly brought, after a sale and distribution of their pictures under the scheme above mentioned.

October Term, 1852.

APPEAL from a judgment of the supreme court of the first judicial district in favor of the plaintiffs against the defendants.

, for appellants.

, for respondents.

RUGGLES, C. J. The plaintiffs, as overseers of the poor of the city of New York, claim to recover from the defendants a penalty of \$300, being three times the value of a picture numbered twenty-nine, and entitled "The Huguenots going to Worship, in Charleston Harbor," together with the further sum of \$10.

The statute under which this recovery is claimed, is in these words:

"SEC. 22. No person shall set up or propose any money, goods, chattels or things in action, to be raffled for, or to be distributed by lot or chance, to any person who shall have

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paid or contracted to pay, any valuable consideration for the chance of obtaining any such money, goods or things in action. Any person offending against this provision, shall forfeit three times the sum of money or value of the articles so set up, together with the sum of ten dollars, to be recovered by and in the name of the overseers of the poor of the town where the offense was committed."

The picture above mentioned, together with three hundred and nine others, was about to be distributed by lot or chance, in pursuance of the constitution and by-laws of the corporation of the American Art Union, and were by public advertisement announced and offered to be distributed by lot, as aforesaid, among thirteen thousand members and subscribers. This took place immediately previous to the commencement of the legal proceedings to recover the penalty in question.

The picture number twenty-nine, was of the value of one hundred dollars. Pictures are chattels. The Art Union proposed to distribute them by lot or chance, among its subscribers. Each subscriber had paid five dollars, which made him a member of the corporation, and entitled him to a chance in such distribution of obtaining the picture in question as a prize. The scheme of the Art Union, and the proposition to distribute the pictures by lot, is, therefore, a violation of the statute above recited, unless this association has some special authority which exempts it from its operation.

The act of January 29, 1844, entitled: "An act to amend the act to incorporate the 'Apollo Association' for the promotion of the fine arts," passed May 7, 1840 (*Laws of 1844*, p. 7), is supposed to create such an exemption, and to operate as a repeal of the statute against raffling and lotteries, so far as respects the American Art Union.

The American Art Union was originally incorporated by the name of the Apollo Association, with power, among other things, of making such a constitution, by-laws and regulations, as they should judge proper for certain enumerated purposes. The fourth section of the act directed the

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annual election of officers to be held on the third Monday of December ; but the act did not give, or purport to give, the corporation the power of distributing pictures or other property by lot, or of regulating such distribution by their constitution or by-laws. The corporation made and adopted a constitution on the 23d of December, 1843, and by its tenth section, it was provided that at the annual meetings of the association in December, the works of art purchased during the year should become by lot, publicly determined, the property of individual members, each member being entitled to one chance or share in such distribution for each five dollars by him subscribed and paid. By the first section of the act of January 29, 1844, the name of the Apollo Association was changed to "The American Art Union." The second section is as follows : "The distribution of the works of art belonging to the association, provided for in the constitution thereof, and the annual election of officers, shall be held on the Friday preceding the 25th day of December, in each year, instead of the time stated in the fourth section of the act hereby amended."

The defendants insist that this statute recognizes the distribution by lot of the works of art belonging to the corporation, as a lawful act, and, therefore, repeals the statute against raffling and lotteries, first above quoted, so far as it would otherwise have made such distribution illegal. But if the scheme of the association, for the purchase and distribution of its works of art, by lot or chance, is a lottery, within the meaning of the state constitution of 1821, which was in force at the time of the passing of the statute above mentioned, the legislature had no power to authorize or sanction it; and the second section of the act of 1844, is therefore inoperative, either as a grant of power or a recognition of such grant.

This brings us, therefore, to the real question in the case, namely : whether the plan or scheme of the Art Union, above mentioned, is a lottery, within the constitutional prohibition ?

The eleventh section of the seventh article of the constitution of 1821, is in these words : "No lottery shall here-

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after be authorized in this state, and the legislature shall pass laws to prevent the sale of all lottery tickets within this state, except in lotteries already provided for by law."

This prohibition is general. It must be held to embrace all lotteries, unless there be some very clear and satisfactory reason for understanding it in a very limited sense. It was urged on the argument that public lotteries for pecuniary prizes, as a means of raising revenue, were alone within the contemplation of the framers of the constitution. But lotteries have never been created within this state for the purpose of general revenue, and there is, therefore, no ground for believing that the prohibition was intended to be limited to lotteries for that object. This would have been restraining a mischief which did not exist, and tolerating that which did. Lotteries had been authorized by the legislature for the benefit of colleges, for the making of roads, for the building of bridges, for the improvement of ferries, for the creation of hospitals, and for various other purposes equally commendable and beneficial.

All these were clearly within the prohibition. The prohibition was not aimed at the objects for which lotteries had been authorized, but at that particular mode of accomplishing such objects. It was founded on the moral principle that evil should not be done that good might follow; and upon the more cogent practical reason that the evil consequent on this pernicious kind of gambling, greatly overbalanced in the aggregate, any good likely to result from it. The promotion of the fine arts is undoubtedly a commendable object; but the prohibition contains no exception in its favor on that ground. Payment of the prizes in money, is not one of the essential ingredients of a lottery. Whenever the scheme of distribution is such that if the payment of the prizes were in money it would be a lottery, it will be equally so, although the prizes are payable in lands or chattels.

In 1820, the city of Albany was authorized by a statute, to dispose of its public lands by a lottery, not to exceed in amount \$250,000. The distribution of these lands by lot or chance, was denominated a lottery in the title and in the

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body of the statute (*Laws of 1820, p. 224*). Payment of prizes in money, therefore, is not essential to a lottery, within the meaning of the word as used by the legislature, before the adoption of the constitution in 1821. The intention of the framers of the constitution undoubtedly was, to forbid the future granting of any such lotteries as had at any time previously been authorized by law, and by requiring the legislature to pass laws to prevent the sale of all lottery tickets, to put an end to all such distributions of money or goods, by lot or chance, as had heretofore been forbidden by the statute, under the name of private lotteries. A reference to the statutes of the colony and the state, against private lotteries, will show conclusively that all schemes for the distribution of private property of any description, by lot or chance, were regarded by the legislature as coming within the denomination of private lotteries. The sale or disposition "of any goods, wares and merchandise, by way of, or in manner of lottery," was prohibited in the province as early as 1721, by an act entitled "an act to prevent private lotteries in the province of New York." The same thing was done by another colonial statute in 1771, with a similar title (*Van Schaak's Laws, pages 124 and 674*). The statute of 1783 contains a similar provision (2 *K. & R.* 35), and this is repeated in the act of 1813 (1 *Revised Laws*, 188).

That the prizes to be distributed by the Art Union scheme had no fixed market value, is of no importance in relation to the point in question. To render it material, it would be necessary to show that they were of no value. This is by no means true. They are valuable, although not readily salable in market for what the artists believe them to be worth. They are articles of merchandise. The intention of the scheme is to sell them for more than they can be sold for at private sale; and this was to be brought about by an appeal to the universal passion for playing at games of chance. The indulgence of this passion was precisely what the constitution intended to repress and prohibit.

Nor is it material to the question in hand, that the prizes were not known and designated when the tickets or chances

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were subscribed and paid for. The scheme, in this respect, was more objectionable than a scheme in which the prizes are previously fixed, because it affords less security to the subscribers that the chance purchased is worth the money paid for it. The Art Union scheme is a lottery, within the ordinary meaning of the word, as defined in the English dictionaries. It is "a distribution of prizes by chance," which is one of the definitions of a lottery by Johnson and Webster. It is "a kind of game of hazard, wherein several lots of merchandise are deposited in prizes for the benefit of the fortunate" (*Rees' Cyclopaedia*). It is "a game of hazard, in which merchandise is deposited in prizes for the advantage of those who gain the tickets which entitle them to such prizes" (12 *Brewster's Ed. Encyclopedia*, 258).

The scheme in question has all the attributes or elements of a lottery. It is a distribution by lot of a small number of prizes among a great number of persons. The prizes and blanks are drawn in the manner in which prizes and blanks are drawn in other lotteries. The certificate of membership is a ticket, which entitles the holder to a chance for a prize of a much greater value than the price of the ticket. It is a lottery according to the common acceptation of that word. It is a lottery within the definitions in the dictionaries. It is a lottery within the meaning of the word, as used in the legislature of the colony and state of New York, for more than a century; and we should be trifling with, and perverting the language of the constitution, if we were to say that it is not a lottery within its prohibition. If no lotteries had existed excepting such as is contained in the Art Union scheme, it is not probable that they would have been forbidden by the constitution or by law. Its mischiefs are certainly not so apparent as if its prizes were to be paid in money, or as it would be if framed for the purpose of enticing the necessitous and improvident into its hazards.

But this case cannot be decided according to the views we may entertain of the probable good or evil consequent upon the execution of the scheme. The constitution took away from the legislature the power of determining whether this

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or any other lottery was of good or evil tendency, and certainly did not intend to confer that power on the judicial tribunals. If it were to be admitted that the scheme is entirely harmless in its consequences, it would form no ground for making it by judicial construction an exception to the general and absolute constitutional prohibition.

The constitution of 1846, contains a provision against lotteries and the sale of lottery tickets, substantially like that in the constitution of 1821.

The judgment below must be affirmed.

NEW YORK COMMON PLEAS.

MARY M. BERWICK and others agt. CHARLES DUSENBERRY.

There is nothing growing out of the relation of *husband and wife*, which prohibits the wife from acting as the *agent of her husband*; and if her acts be *approved* by the husband, such approval is equivalent to an original authority.

When the act done for another is apparently for his benefit, *slight evidence* should serve to establish a ratification.

Where during the husband's absence, his wife without his authority, hired a house for one year, the rent payable monthly in advance, and entered into possession thereof on the 1st of May, and on the 6th of May the husband returned and resided in the house with his wife until the 24th of May, when he paid the rent for the month of May, and moved out:

Held, that the husband, the defendant, was liable for the rent of the premises for the whole term. If the defendant intended to object to the hiring by his wife, on the ground that she had no authority, he should have acted promptly; his delay was a ratification of her conduct.

General Term, February, 1867.

Before DALY, C. J., BRADY and CARDOZO, Judges.

THIS action was brought to recover the rent of certain premises for the month of June, 1866. During the defendant's absence his wife hired the premises in question for one year, payable monthly in advance, and took possession on the 1st day of May. On the 6th of May, the defendant returned, and moved out of the house on the 24th, as soon as he could, and paid the rent for the month of May.

The defendant testified that his wife had no authority to

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hire a house or make a contract for him, as his father was his agent during his absence.

The justice gave judgment for the plaintiff, from which the defendant appealed.

IRA D. WARREN, *for plaintiffs.*

A. H. REAVY, *for defendant.*

By the court, BRADY, J. It may be assumed that the defendant's wife had no authority, express or implied, to hire the premises from the plaintiff, and yet the judgment rendered therein must be sustained.

The defendants' wife took possession of the premises on the 1st of May, 1866, and the defendant, when he returned on the 6th of May ensuing, also went into possession of them, and remained until the 23d or 24th of the same month. He did not, for aught that appears during his occupancy, in any manner advise the plaintiff or his agent, that his wife had acted without authority, and that he did not intend to ratify the contract she had made, nor did he do any act indicative of a similar intent. He said on the trial, that he refused to keep the premises, and moved out on the 23d or 24th of May.

His removal was too late. He had, by his delay, ratified the contract made by his wife. The doctrine on that subject is clearly stated in *Story on Contract* (§ 161), on the authority of adjudged cases, as follows: It is not necessary that the ratification should be express and formal, unless the agent act in the name of the principal, by an instrument under seal, in which case the ratification must also be under seal; but it may arise by implication from collateral circumstances, from the acts of the principal, or from his silence and acquiescence, when it was incumbent on him to object, or when the presumption of a ratification is the only satisfactory explanation of such a silence.

There is nothing growing out of the relation of husband and wife, which prohibits the latter from acting as agent of her husband; and if her act as such be approved, that

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approval is equivalent to an original authority (*Hopkins* agt. *Mollineaux*, 4 *Wend.* 465).

It makes no difference where the act has been adopted, whether the person acting for another was authorized but exceeded his power, or assumed to be authorized, when in fact he was not clothed with power directly or indirectly. (*Story on Agency*, § 253; *Nixon* agt. *Palmer*, 4 *Seld.* 398; *Commercial Bank* agt. *Warren*, 15 *N. Y. R.* 577; *Wilson* agt. *Furman*, 6 *Man. & Gran.* 236.)

And as we have seen that the principal may be held to have assumed the obligation made for him, by his silence or acquiescence, he is required to disavow the act done in his name, within a reasonable time, (*Cairnes* agt. *Bleecker*, 12 *Johns.* 300; *Viainna* agt. *Barclay*, 3 *Cow.* 281; *Gage* agt. *Herman*, 2 *Comst.* 417; *Buckenbecker* agt. *Lowell*, 32 *Barb.* 9; 2 *Kent's Com.* 616; *Benedict* agt. *Smith*, 10 *Paige*, 127,) and particularly where, as in this case, he availed himself of the benefit of the contract made for him by occupying the premises. When the act done for another is apparently for his benefit, slight evidence should serve to establish a ratification (*Commercial Bank* agt. *Warren*, *supra*, § 579).

There seems to be great propriety in applying such a rule strictly to a case like the present, in which it appears that the wife during the absence of her husband hired a dwelling, which may be classed as one of the necessities of life. In this case, however, the ratification is abundant. The defendant followed his wife to the premises hired and occupied by her, and remained there, as already shown, for eighteen days. These were acts from which no other conclusion was to be drawn by the landlord than that he intended to remain for the term secured. As said by STRONG, J., in *Gage* agt. *Sherman* (*supra*), "if the defendant intended to object to the terms of sale he should have acted promptly. The plaintiff might then have taken his land back, and probably without loss."

The justice in this case held that the delay of the defendant in reference to the repudiation of the contract, having

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taken possession of the premises as he had, was unreasonable, and we think it was. He should have acted promptly, and restored the possession to the landlord.

The judgment should be affirmed.

SUPREME COURT.

JOHN B. AYRES agt. THE WESTERN RAILROAD COMPANY.

1. An action brought by an assignee of a claim for damage for the breach of a contract of a common carrier to carry goods is an action by an assignee of a promissory note or chose in action, within the meaning of the judiciary act, and cannot be removed into the circuit court of the United States.
2. Where a defendant has been served with process in a state court, and, before filing his bond and petition for the removal of the cause, his attorney obtains an *ex parte* order extending the time to answer, although such extension is obtained for the purpose of making the application of removal, and the attorney serves the order upon plaintiff's attorney, indorsing it with his name as "Defendant's Attorney:" *Held*, that the defendant had submitted to the jurisdiction of the state court, and had lost the right to remove the cause; although his appearance was subsequently entered within the required time in the state court, and the bond and petition there filed for removal. (BARNARD, C. J., dissenting.)

New York General Term, November, 1866.

Before BARNARD, P. J., CLERKE and INGRAHAM, Justices.

THE plaintiff, a citizen of New York, brought an action as the assignee of a certain claim of the Southworth Manufacturing Company, a Massachusetts corporation, against the defendant, a corporation incorporated in Massachusetts, but who were the lessees and who operated a railroad from East Albany to the state line, for the loss of certain goods by fire, in defendant's hands as a common carrier.

The complaint set out the non-performance of the contract to carry, the loss of the goods, and that the goods and the claim for damages had been assigned to the plaintiff.

The summons and complaint were served on the 5th of June, 1866, upon the defendant's attorney, who obtained an *ex parte* order on the 25th of June, for time to answer, in order that he might apply to remove the cause into the cir-

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cuit court of the United States, and served a copy of the order, indorsing it "please to take notice," &c., &c., and signed it with his name as defendant's attorney.

The defendant's formal appearance was entered in the supreme court, as under the old practice, and the petition and bond filed on the 5th of July.

At the special term Mr. Justice BARNARD ordered the cause to be removed to the circuit court of the United States, and from this order the plaintiff appealed.

BLISS & CADWALADER, *for appellant.*

JOHN H. REYNOLDS, *for respondent.*

By the court, INGRAHAM, J. The defendants are incorporated under the laws of Massachusetts. The plaintiff is a citizen of New York, and sues as assignee of a company incorporated under a law of Massachusetts. The defendant moved for an order to remove the cause into the United States court. The motion was granted, and the plaintiff appealed.

It is clear that between the original parties, as both were corporations created by laws of Massachusetts, this action could not have been removed. But inasmuch as the plaintiff, who is assignee of the claim, is a citizen of New York, the case is within the statute, unless the United States court is prevented from taking cognizance of the action, under the seventeenth section of the United States statute, which says: The court shall not have cognizance of any suit to recover the contents of a promissory note or other chose in action, in favor of an assignee, unless a suit might have been prosecuted if no assignment had been made.

The question then arises, is this action brought to recover upon a chose in action?

A chose in action, or a thing in action, is a term used in contradistinction to a chose or thing in possession, and is applicable to cases where the title to money or property is in one person and the possession is in another, which by contract he is bound to deliver to the owner.

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In *Campbell agt. Perkins* (8 N. Y. R. p. 430), it was held that a claim against common carriers, although in form for a wrong, was founded on contract. It was founded on an agreement, and is technically a claim. If so, then the claim is a chose in action transferred to the assignee, and bringing the case within the exception of the statute.

It is similar in its nature to that of *Anderson agt. The Manufacturer's Bank* (14 Abb. R. 436). That action was against the defendant for not protesting a note. The ground was negligence. So here the action is for not delivering goods according to agreement.

I think there is good grounds for holding also, that the defendant, by obtaining time to answer by an order from the court, and serving that with a notice signed by an attorney, as attorney for the defendant, has done what is equivalent, to an appearance. It was doing an act within the progress of the cause, and submitting to the jurisdiction of the state court, and was equivalent to an appearance (*Cooley agt. Lawrence*, 5 Duer, 610).

The order should be reversed.

CLERKE, J., concurring.

BARNARD, J., dissenting.

Order appealed from reversed.

BARNARD, J., *dissenting*. In order to bring this case within the principle of the case of *Anderson agt. Manufacturer's Bank* (14 Abb. 436), it must be determined that this action is brought to recover the contents of a promissory note or other chose in action, and if this is its character, it was conceded on the argument that the defendant was not entitled to remove the cause for trial into the federal court.

The action is brought against the defendant as a common carrier, for damages on account of the non-delivery of goods delivered to it by the Southworth Manufacturing Company, at Springfield, in Massachusetts, for transportation to a western state.

It is alleged in the complaint, that the defendant has wholly failed and refused to transport or deliver the goods, on account of which the Southworth Manufacturing Com-

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pany sustained the damages claimed, and that the said Southworth Manufacturing Company has duly sold, assigned and transferred to the plaintiff, all its interest in said goods, wares and merchandize, and its claim, demand and cause of action against the defendants.

It is thus obvious that the plaintiff is the vendee of the goods to be transported, or the claim to damages, after the defendant had violated its agreement to transport them, and had lost them, or converted them to its own use. This brings the case clearly within that of *Deshler* agt. *Dodge* (16 How. U. S. R. 622). In that case, the suit was brought by the plaintiff, a citizen of New York, against the defendant, a citizen of Ohio, in replevin, for a quantity of bank bills, issued by banks in Ohio, and the plaintiff's title was derived by assignment from the Ohio banks. It was entirely clear that the assignors (the Ohio banks) could not have maintained any action against the defendant for the recovery of the bills, for the reason that both the banks and the defendant were citizens of the same state, and the case was, therefore, in this aspect, precisely like the present, and the only question to be determined was, whether it came within the provisions of the act of congress forbidding jurisdiction to the federal courts, in suits by an assignee to recover the contents of a promissory note or other chose in action.

It was held by the supreme court of the United States, that the circuit court had jurisdiction of the action. Mr. Justice NELSON delivering the opinion of the court says (16 How. 631): "We are of opinion that this clause of the statute has no application to the case of a suit by the assignee of a chose in action to recover possession of the thing in specie, or damages for its wrongful capture or detention, and that it applies only to cases in which the suit is brought to recover the contents, or to enforce the contract contained in the instrument assigned. In the case of a tortious taking, or wrongful *detention* of a chose in action, against the right or title of the assignee, the injury is one to the right of property in the thing, and it is, therefore, unimportant as it

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respects the derivation of the title ; it is sufficient if it belongs to the party bringing the suit at the time of the injury.

“The distinction as it respects the application of the 11th section of the judiciary act to a suit concerning a chose in action is this: Where the suit is brought to enforce the contract. The assignee is disabled, unless it might have been brought in the court if no assignment had been made ; but if brought for a tortious taking or wrongful detention of the chattel, then the remedy accrues to the person who has the right of property or of possession at the time, the same as in a case of a like wrong in respect to any other sort of personal chattel.”

It is difficult to see why this decision is not decisive of the present appeal ; for it is entirely clear that this is an action to recover damages for the detention or non-delivery of personal property, and not for the recovery of the contents of a chose in action, within the meaning of the act of congress.

The plaintiff is not the assignee of the original contract for the transportation of the goods, but the assignee of the goods themselves, and of the cause of action arising from their conversion by the defendant, or the refusal to deliver them on demand.

It is thus obvious that the plaintiff acquired no right by assignment until after the original contract had been broken, and the right thus acquired was to the goods *in specie*, or to damages for their unlawful detention. Such an action, according to the decision of the supreme court of the United States, is not an action to recover the contents of a chose in action, and is not within the exception named by the act of congress.

It may also be observed that actions against a common carrier for the loss of goods, although sometimes said to be of an amphibious character, still belong to the class of actions *ex delicto*, and hence cannot be regarded as for the recovery of the contents of a chose in action, except upon the assumption that every right to recover damages is in one sense a chose in action. It is very obvious that it was not intended to forbid jurisdiction to the federal courts in all

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cases of actions prosecuted by an assignee, for if such was the intention it would have been so declared. The true construction was given to the statute by Mr. Justice NELSON, in the opinion before referred to, and by that we must be guided.

It is also urged, that because this action is prosecuted by an assignee, the circuit court of the United States has no jurisdiction. This assumes that no action by an assignee can be maintained in the federal courts, and the assumption is entirely unfounded. As before shown, an action to recover damages for the capture and detention of property, is not for the recovery of the contents of a chose in action, and not within the exception of the act of congress; and if not, there is no objection to the jurisdiction. The jurisdiction is forbidden only in specified cases, and it is enough to say that it is not one of them.

It is also said, that if the right of removal is *doubtful*, the order should not be granted, and a suggestion of this kind was made in the case of *Anderson agt. Manufacturer's Bank* (14 Abb. 436). If this case is not within the exception in the act of congress, there is no doubt of the right of removal. It is for the court to determine whether the defendant brings the case within the law entitling it to have the action removed, and if this appears, the question is free from doubt. If on the contrary the case is not one entitled to be transferred to the federal courts, it is equally clear that the order should be refused. It is for the court to say which of these alternatives is presented, and when a conclusion is reached all doubt is removed, and the duty is plain.

If upon the papers presented, the defendant is by law entitled to have the cause removed, the state court has all jurisdiction, and all further proceedings in it are *coram non judice* and void, and the judgment pronounced will be reversed (*Gardner agt. Langest*, 16 Peters' 97). And if the case is improperly removed, the circuit court will remand it to the state court; and if in such case the circuit court should improperly entertain jurisdiction, the supreme court will correct the error (*Pollard agt. Dwight*, 4 Cranch, 429).

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It is thus perceived that if this court should improperly transfer a cause, its judgment in favor of the plaintiff will be ineffectual, and if it should improperly send a case for trial to the circuit court of the United States, that court will correct the error, and remand the case to us.

It is thus apparent that in no event can the right of either party be ultimately lost, and this disposes of the objection made by the plaintiff's counsel on the argument, that if this cause should be improperly removed, the right of the plaintiff might be lost by the running of the statute of limitations; for if the circuit court shall refuse to entertain jurisdiction of this case, if transferred, it will be remanded, and no new action in this court need be commenced.

The objection that the petition for the removal was brought too late, is not tenable.

The summons and complaint were served on the 5th of June, 1866, and the time to answer would expire on the 25th. On that day an affidavit showing the intention of the defendant to apply for a removal of the cause to the federal court; a chambers' order was obtained from a justice of this court extending the time to answer twenty days, which was duly served.

This was not entering an appearance in the action; it was only a proceeding to prevent the entry of judgment, to enable the defendant to comply with the act of congress, and apply for a transfer of the cause. On the 5th day of July, the appearance of the defendant was entered by a special order, and on that day the petition and bond was filed. This must be regarded as sufficient for otherwise, under our practice, a defendant entitled to have his cause tried in the federal court, would wholly lose the benefit of the provisions of the act of congress, if for any reason he was unable to file his petition within twenty days after he was served with a complaint.

It would be strange if an extension of the time to answer, for the very purpose of enabling a defendant to apply for a removal of the cause, should be regarded as such a submission to the jurisdiction of the state court as will deprive him

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of the benefit secured by the act of congress. It must be observed also, that our practice has radically changed since the act of congress was passed, and it is not now entirely clear, what under the present system is the "entering of an appearance in a state court." It certainly is not done by obtaining an order extending the time to answer, and perhaps there is no other way of complying with the provisions of the statute than was done in this case. At all events, we regard it as sufficient.

The defendant is a corporation created by the laws of the state of Massachusetts, and is, therefore, a *citizen* of that state. This now is too well settled to be longer questioned, and it is not questioned in this case.

It is said, however, that because the defendant is the lessee of, and operated a railroad organized under the law of this state, that it does not come within the act of congress.

The right of removal depends upon the *citizenship* of the parties, and not upon the extent of the business they transact in this state, and it is not perceived how it can be said that a citizen of Massachusetts, doing business of any kind within this state, has waived his right to remove a cause to the federal court. Any such construction would nullify the act of congress.

It is quite true that it has been decided at a special term (24 *How. Pr. R.* 517), that a foreign insurance company doing business in this state, and having appointed an agent under a special statute, upon whom process might be served, lost the right to remove a cause to the courts of the United States. It is unnecessary to say whether this case was rightly decided or not, and there may be grave doubts as to its correctness. Yet the case is wholly unlike this, for here the defendant has waived nothing, if coming into this state by its agents, and doing business, is not to be deemed a waiver of the right secured by the act of congress; and clearly this is not so.

The order appealed from should be affirmed, with ten dollars costs.

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COURT OF APPEALS.

**THE MUTUAL BENEFIT LIFE INSURANCE COMPANY, appellants
agt. THE BOARD OF SUPERVISORS OF THE CITY AND COUNTY
OF NEW YORK, THE MAYOR, ALDERMEN AND COMMONALTY OF
THE CITY OF NEW YORK AND JAMES NESBITT, respondents.**

SAME agt. SAME, except JOHN H. HILLYER, instead of NESBITT.

No relief can be administered *in equity*, where the remedies *at law* are adequate for the attainment of justice.

Where a *tax* is imposed in this state on the amount of stocks and bonds deposited with the comptroller of this state, by a foreign life insurance company under the laws of 1851, having an agency and doing business in this state, such company cannot sustain an equitable action against, and restrain by injunction, the proper authorities by which such tax was imposed, from the collection thereof. The assessment of such a tax may be reviewed and corrected by *certiorari*, or be stricken from the roll by *mandamus*.

September Term, 1866.

THESE actions were instituted to test the liability of these plaintiffs to be taxed in the sum of \$100,000, deposited by them with the comptroller of this state. The plaintiffs are a corporation under the laws of the state of New Jersey, for the business of life insurance. They had an office in the city of New York, and an agent there for the transaction of such business.

By an act of the legislature of this state passed in 1851 (*chap. 95*), all companies transacting the business of life insurance within this state, were required to deposit with the comptroller of this state \$100,000 in public stocks or bonds. The comptroller was to hold such stocks, bonds and mortgages, as security for policy holders (§§ 1 and 2). Under the provisions of the act, these plaintiffs deposited with the comptroller of the state the sum of \$100,000, and this sum has been included in the assessment lists of the city of New York, against these plaintiffs, as so much personal property liable to taxation under the laws of this state.

In 1856, the board of supervisors of the city and county of New York imposed as a tax thereon, the sum of \$1,383,

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and the defendants, or some of them, were proceeding to collect the same.

The first above entitled action was commenced in the superior court of the city of New York. The complaint set out the foregoing facts, and claimed that the said tax was erroneous and unlawful, and should be remitted or corrected. It also set forth that the board of supervisors had issued their warrant to the defendant, James Nesbitt, to collect said tax, and that he, by virtue thereof, had levied upon the property of the said plaintiffs; that the amount of the tax when collected, would be the property of the defendants, the mayor, &c., of the city of New York. The complaint prayed that the defendants might be enjoined from collecting the tax, or from interfering with the property levied, and that the court would adjudge that the defendants be restrained from collecting or receiving the same, or for such further or other relief, or both, as might be just.

The defendants demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action.

Judgment was given for the defendants, dismissing the complaint with costs, and this judgment was affirmed at the general term, and the plaintiffs now appeal to this court.

The second of the above entitled actions was commenced in the supreme court, and the complaint set out an assessment in the same manner, and an imposition of a tax thereon in the sum of \$1,556,44 for the year 1857, and otherwise contained the same facts and the same prayer, as the complaint in the superior court.

The demurrer thereto alleged these grounds: First, that the supreme court had no jurisdiction of the subject of the action; second, that said court could not review by complaint and injunction the proceedings of subordinate tribunals, created by and acting under a statute, and clothed with the exercise of political powers; third, that the complaint did not state facts sufficient to constitute a cause of action.

Judgment was given for the defendants, and the same was

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affirmed at the general term, and the plaintiffs now appeal to this court.

A. C. BRADLEY, *for appellants.*

These suits ask the judgment of the court whether the plaintiff is liable to two taxes imposed upon it—the first in 1856 for \$1,383, the second in 1857, for \$1,556.44, in New York city upon \$100,000, in bonds of Brooklyn, Albany and Troy, incorporated cities of this state, deposited with the comptroller, and which remained in his custody when the taxes were assessed.

Both actions were commenced in that city—the first in the superior, and the second in the supreme court—by summons and complaint verified. In both the defendants have simply demurred.

The plaintiff is a life insurance corporation, created by the state of New Jersey; with an office at Newark therein, where all of its policies of insurance are signed, and where all elections, all meetings of directors and of committees are held, and all business transacted. It has never had any office elsewhere. It has in the state of New York about twenty-five agents, whose business is limited to receiving applications for insurance, transmitting them to the plaintiff at Newark, and when approved by it, delivering the policies, and receiving and remitting premiums to the plaintiff at Newark. It has no money or capital invested in any manner in its business in the state of New York except bonds and mortgages, for monies loaned, which are all kept at Newark, and stocks, being bonds of the cities of Brooklyn, Albany and Troy, which are all lodged with the comptroller of the state of New York, in pursuance of a law of said state, (*Laws of 1851, chap. 95, §§ 1, 2 and 3, p. 167*), *the only law which ever required or even authorized a life insurance company created by another state to deposit securities with the comptroller or other officer of this state, or empowered such comptroller or officer even to receive them.* That law however was repealed by laws of 1853, chapter 463, section 22, page 890, &c. Notwithstanding such repeal, and because the stocks had not been surrendered, the board of supervisors assessed the plaintiff for the taxes in question, issued their warrants for the collection thereof—in the one case to the defendant Nesbitt, and in the other to the defendant Hillyer, by whom respectively, property belonging to the plaintiff, which happened to be found in the city was seized, and notice given that the same would be sold for the payment of the said taxes, penal interest and costs. The taxes, when collected, of course would go into the treasury of the mayor, aldermen and commonalty of the city of New York, to be used like other moneys, as may be lawful. All this is alleged in the complaint, and of course admitted by the demurrer.

In both complaints the plaintiff expressly denies its liability on the facts stated to be taxed under any law of the state of New York; and on the merits of the case, that is the sole question. It may perhaps be allowed further to state not as varying, but to show the gravity of the question, that similar taxes have been levied, and similar proceedings instituted in every subsequent year, down to and including 1864, but by arrangement stayed to abide the event of the cases now at the bar. The aggregate of all these taxes is about \$15,000, and unless there be a remedy here and in this form, there is no remedy anywhere, or in any form.

I. And on the merits, the statutes and the decisions of this court, have left nothing to argue. Corporations created by other states, doing life insurance here, must now make their deposits with some officer of the state by which they are created (*Laws 1853, ubi supra, § 14*). This, however, only applies to states in our

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union, and not to corporations doing life insurance, created by foreign governments. These must make deposits with the comptroller, exactly as if they were created by this state. (*Laws of 1853, p. 893, § 15, also §§ 6 and 17; International Life Ass. Com. agt. Com. Taxes, 28 Barb. 318; British Commercial Life Ins. Co. agt. Same, 28 How. P. R. 41.*)

The distinction between such companies created by other states, and those created by foreign governments *not being states of this union*, is sharply drawn in the statute of 1849, page 441, section 7, is obliterated by the act of 1852, and restored by that of 1853, sections 14 and 15. And in *The People agt. The New England Mutual Life Ins. Co.* (26 N. Y. 303), this court held that the defendant, a corporation created by the state of Massachusetts, and having its office in Boston, but agencies like ours here, and having deposited a hundred thousand dollars with the comptroller at Albany, which deposit had not been withdrawn on repeal of the law requiring it, was not liable to taxation.

That distinction harmonizes the decisions, and the only question is, whether New Jersey is a state in the union?

It is true that the Massachusetts suit came into court on a "case agreed" (*Code, § 372*). But such a proceeding is allowable only where the "question in *difference might be the subject of a civil action*," and it is to be submitted to some court, "which would have had jurisdiction if an action had been brought," and which is to "render judgment thereon *as if* an action were depending." But the case is not required to contain anything but "the *facts* on which the controversy depends;" that is, the bare facts constituting a cause of action, which the complaint would have had to state, if instead of a case agreed, there had been an action; just what in these cases at bar, the complaints do state and the demurrers do admit. *Mutato nomine*, therefore, that Massachusetts case is each of these, except that here the wrong has proceeded further, and been oftener repeated; for that case shows nothing *after* the illegal assessments; a distinction that can be made adverse to the plaintiff here only on some such ground as the greater the wrong the less the right to redress, or that eight years, or if it be not allowable to look beyond the two actual cases at bar, then two years of repetition makes wrong right as a custom.

In that case, it is true that the people were parties—whether the only parties maintaining the validity of the tax, the report fails to show—and it is equally true that they may be proper or even necessary parties defendant here. There can, however, be no pretense that they should have been the only parties, and no objection of non-joinder is taken (§§ 144 and 148).

All that is or may be suggested about other remedies by special proceedings instead of by action in these cases, was equally or more applicable to that.

A *certiorari* would have brought up the assessment roll. But, if in that case as in these, the roll had located the party assessed, both *it and its property* in the first ward of the city, the return would have shown full jurisdiction, provided, always, tribunals, whether judicial, administrative or political, can acquire jurisdiction *simply by acting just as if they had it*. In that case, however, as in these, the facts showing want of jurisdiction lay outside of the assessment roll, and therefore would not have appeared from the return.

Mandamus, however, if it had been necessary to resort to it, *could* have done full justice in that case by merely correcting the assessment roll, whereby any warrant endangering the company's property would have become impossible. Here, however, the warrant is out and levied, and forever beyond that remedy. But in that case it was not necessary, and the objection becomes valid in *these*

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only on some such ground as that a party wronged is deprived of redress by not having previously resorted to some unnecessary remedy.

Prohibition, too, if it was an appropriate proceeding for such cases (as notwithstanding *The People* agt. *Works*, 7 Wend. 486; see *People* agt. *Tompkins*, G. S. 19 Wend. 154; *Ex parte Braudlacht*, 2 Hill, 367; *People* agt. *Seward*, 7 Wend. 518; *Ex parte Gordon*, 2 Hill, 363: *People* agt. *Supervisors*, 1 Hill, 195, it clearly is not), might have accomplished something for the New England Company in arresting the court—the board of supervisors—from further proceeding. But here that court, if it be a court, had got through and stopped already. Prohibition never stays proceedings on mere *process* issued.

The true answer, however, is, that those special proceedings are none of them to be resorted to except when there is no other remedy. But such a remedy always exists whenever the facts constitute a cause of action, for then full justice can be done in determining not only the direct rights of the plaintiffs against defendants, and of defendants against plaintiffs, but also the ultimate as well as direct rights of the defendants, all around among themselves (§ 274, *subd.* 1). In special proceedings the justice, such as it is, is partial, but in actions complete, being co-extensive with all the rights and wrongs involved, and with all the parties concerned in either. That cause of action appearing in the New England Company case, it finally, and after adverse decision by one of the same courts, succeeded. The like or a larger, not stronger (for all causes of action are of equal strength) cause of action appearing in ours, we must succeed too, or fail on other grounds.

But it is said that the assessors and the supervisors are now, or will hereafter become personally liable for all damages. Perhaps so; but it is no objection on demurrer only to jurisdiction, and for want of any cause of action in the complaint, that somebody else is or will be liable for the wrong complained of, unless it also appear that the defendants *are not*.

II. Here these cases might be rested, were it not that the respondents raise questions even upon the concession that the assessments and levies were illegal, and that all the facts and all necessary parties are in court. The ground is not indeed quite that municipal corporations have only to *make* illegal assessments, in order to put themselves beyond the restraint of courts in the collection. That would be quite broad. The ground taken is narrower, and is best stated in the words of the points themselves:

“*First*. An injunction will not be granted to sustain the collection of a tax illegally imposed upon the personal property of the plaintiff.”

“*Second*. There is no allegation in the complaint which brings these cases within either of the three exceptions to the general rule that a court of equity will not entertain an action by a party aggrieved, for relief against an erroneous or illegal tax or assessment.”

That is going far towards the old red sandstone of jurisprudence. For it refers to a time when the distinction between legal and equitable remedies *yet* continued, and when an uniform mode of proceeding in all cases, had *not* been established; when the distinctions between actions at law and suits in equity had *not* been abolished; when every right and every wrong had *still* its special name, form and pigeon hole, and when every mistake of pigeon hole form or name, was *still* as fatal as to have had no right or wrong; when all actions for the enforcement or protection of private rights, or the redress of private wrongs, had *not* been reduced to a single form, and when all other forms of pleadings had *not* been swept away; when it was *not* enough in any and every case that the plaintiff should state facts sufficient to constitute *any* cause of action whatever, in his favor, against the

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defendants; when there could *not* be joined in the same complaint several and all causes of action, whether such as had used to be denominated legal or equitable, or both, where they arose out of the same transaction, or different transactions connected with the same subject matter (and if no objection specially therefor were taken by demurrer); all other causes of every kind, also—when there prevailed *other rules than now* prevail, as to parties plaintiff and parties defendant, and when the courts could *not* grant every relief whatsoever, consistent with the case made by the complaint and within the issue, not only in giving judgment for or against one or more of several plaintiffs, or for or against one or more of several defendants, giving even defendants affirmative relief against plaintiffs, and then after all this, determining the ultimate rights on each side as between themselves; and when, finally, it was *not* enough in every case of a judgment requiring the performance of any act other than the payment of money, or the delivery of real or personal property, to serve a certified copy of the judgment, in order to make disobedience a contempt.

The respondent's points, therefore, refer to a state of things long passed away, and all the authorities giving them any sanction, except the two cases at bar, which, by a strange circuitry of reasoning, are cited as authorities in point for themselves, were decided either before the flood, or when dry land was just beginning to appear.

It is no longer allowable to infer from the non-existence of a known remedy the non-existence of any right protected or enforced, or of any wrong; but now the right or wrong being shown, all remedies whatsoever, appropriate to the protection or enforcement of the one, or the redress of the other, are as much within the jurisdiction as the parties or cause of action; nay, remedies are all that there ever *is* or *can be* of jurisdiction, for courts do not create rights or wrongs, and have no concern with parties or causes of action, except to find or make the remedies just commensurate with each case as it is.

Of the old remedies, many are quite gone, and of those that remain not one is unchanged; while in disposing at once of all causes of action arising out of all transactions connected with the same subject matter, doing full justice to all parties all around, it becomes often wise and just to employ such new remedies that would have made Lords KENYON and ELDON, sitting each in his form-bound tribunal, stare and gasp.

It proves nothing then, to show that courts of equity would not have taken cognizance of a given case, or that injunction is an inappropriate remedy; for the first objection is true in nine of every ten cases, and the second in ninety-nine of every hundred; or if the new mode of bringing into contempt, by bare service of the judgment has taken its place, then the objection is good in every case. There will, nevertheless, if private rights exist to be enforced or protected—or private wrongs to be redressed—be abundant remedies.

Now the complaints in the cases at bar, state facts showing, not assessments erroneous *within* jurisdiction, but utterly void, as transcending all jurisdiction, warrants issued, property of the plaintiff seized, with notice to redeem or sale; all this by one of the defendants for the benefit of another of the defendants, by the instrumentality of the third defendant. Here are rights of property invaded, other rights endangered, and a right of return and of damages, and of future immunity, to be enforced—no suggestion of misjoinder or non-joinder—no mention in the complaint, either of courts of equity or of injunctions. The defendants have not suffered default, but made an issue of law, whether the complaints state facts sufficient not for an injunction, or to show jurisdiction in a court of equity, but to constitute a cause that is *any* cause of action.

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The actual damage, however, thus far inflicted is small, the bulk of the wrong being still impending, and the main redress will be something directly or indirectly restraining the defendants. This may be first by judgment of damages for the seizure and detention, and of return; or second, by judgment for the whole value, as upon a conversion; or third, by a simple judgment without damages that the taxes are void, and directing a relinquishment of the levy; or fourth, by final injunction, if such a writ still survive.

In the first two cases, attempts to collect the same taxes by new proceedings, would be met by the doctrine of *res adjudicata*, and in the last two by proceedings as for a contempt. In the first two the restraint upon the defendants would be indirect, in the last two direct; but in all there would be restraint. Any one of them would be sufficient for the plaintiff; none of them would wrong the defendants; for it can never be a wrong either to be obliged to make compensation for wrong done, or to desist from continuance in doing it. Each of these is consistent with the case made by the complaint, and within the issue, whether that case contains a cause of action. And what a court of equity would or would not have done with such a case before the Code, is just as immaterial as what the Roman Prætor would or would not have done before or after Justinian.

The demand of relief is equally broad or broader; for besides restraint, without specifying the kind, it asks further and other relief, or both. But whether it be held to be so general as to amount to no demand at all, or so narrow, by asking only such relief as courts of equity give in a case where they give none, as to amount to just the same thing, still the plaintiff's supposition of the relief to which he is entitled, is of no importance except in the event of a failure to answer (Code, §§ 129, 142, subd. 3, § 246, subd. 2, §§ 278, 275; also Voorhies' Code, notes to same sections), an event which a demurrer prevents by raising an issue of law demanding a trial (§§ 248 and 252). But defect or inappropriateness of relief is not a ground of demurrer (§§ 144 and 149), and therefore cannot be brought within any issue. On failure to answer, the relief granted is only such as shall be consistent with the case made by the complaint, and within the relief demanded; while in every other case, that is, whenever there be an issue (which in the cases at bar is whether there be facts constituting a cause of action), it is any relief consistent with the case made, and within the issue. Wherefore, although on judgment for plaintiff on demurrer he is to proceed in the manner (§§ 269, 246), he is not limited to the relief in cases of failure to answer, but takes any relief whatever, commensurate with his rights and wrongs, as shown by the facts stated in his complaint. (Cowenhoven agt. City of Brooklyn, 38 Barb. 9; N. Y. Ice Co. agt. N. Western Ins. Co. 23 N. Y. 257; Wright agt. Hooker, 10 Id. 51; Byxbie agt. Wood, 24 Id. 607; Barlow agt. Scott, Id. 40; Redmond agt. Dana, 3 Bosw. 616.)

III. The defendants all belonging in New York, and served there—the cause of action having arisen there, and the subject of the action situated there—the superior court (§ 83) as well as the supreme court, had jurisdiction of the person of the defendants, and of the cause of action.

IV. The second ground of demurrer assigned in the second of the cases at bar, if it raise questions either of jurisdiction or the sufficiency of the facts, is already disposed of with those questions. If it raise any different question, it states no ground allowable by section 144, and so is no demurrer. Even if it were otherwise, the assumed ground of it does not exist in either of these cases. They do not seek to review by complaint or injunction, or to review at all the proceedings complained of. Errors committed within jurisdiction, have no doubt this tenderness shown them, that they shall be corrected only by special proceedings, in prescribed modes of review. But wrongs without jurisdiction, are every where sim-

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ply void. Judgments—one in the superior court, and the other in the supreme court of the first district, rendered against these plaintiffs, without jurisdiction of the person or cause of action, or on complaint showing no cause of action, would have been just as void as these taxes, and no more entitled to review—and if executions had been issued and levied—actions brought to arrest the wrong, even in the courts where the void judgments had been entered, would have been just as liable to the objection that *appeals* could not be brought by complaint and injunction, as these actions are liable to the objection now made. *That* would be no appeal, just as *this* is no review.

In *Hayward agt. City of Buffalo* (14 N. Y. 534), Judge DENIO was clear that the action would have been maintained if a warrant had been levied on plaintiff's property: for want of this the action was a mere *quia timet*, and there was nothing to be afraid of—the assessment being so clearly void as to be even no cloud on a title, and the defendant had no personalty which a warrant could have reached—simply, there was no cause of action. Similarly in all cases. Whenever one has been injured by the wrong of another, he may have redress and immunity, not because the injury was done under color of an illegal tax, assessment or judgment, but because of the injury. He might sue for the injury, omitting all mention of the matters under color of which it was done—and this would be best, were it not that the embarrassment arising from possible defenses set up by defendants, render it more convenient to tell the whole story at the outset. Still the *gravamen* lies in the bare injury, doing and being threatened. On the other hand, however, a man not yet hurt, but only afraid of some void tax that may never hurt him, is in a different position. There in many cases, the courts refuse to interfere, not because they are courts of equity any more than courts of law, but simply because *damnum absque injuria* constitutes no cause of action any where.

These cases at bar, therefore, are not cases to review errors *within* jurisdiction—nor yet suits merely *quia timet*; and if they were the latter, the New England case so often referred to, is in point to show that there is a real danger against which it is just that courts of justice should interfere.

V. The judgments below should be reversed, with costs.

A sudden illness of Mr. Bradley having prevented the points for appellants from being furnished within the time required by the rules, and the corporation counsel having by stipulation, now on file with the clerk, consented to an extension of twenty days from the 22d October last, his honor the chief judge, directed the time to be extended accordingly, and a note to that effect to be submitted with the points.

NEW YORK, Nov. 7th, 1866.

A. R. LAWRENCE, JR., *for respondents.*

RICHARD O'GORMAN, *counsel to the corporation.*

These actions are brought by the appellants to restrain the collection of taxes alleged to have been illegally imposed upon the appellants during the years 1856 and 1857, respectively.

The respondents demurred to the complaint (*Complaint*, pp. 7, 8).

The first case comes up on appeal from the judgment in favor of respondents,

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in the superior court of the city of New York, and the second on appeal from a like judgment in the supreme court in the first district.

The decision below in the superior court is reported in 8 *Bosworth*, 683, and that of the supreme court in 83 *Barbour*, 322.

I. An injunction will not be granted to restrain the collection of a tax illegally imposed upon the personal property of the plaintiff. (*New York Life Ins. Co. agt. Supervisors of New York*, 4 *Duer*, 192; *Heywood agt. City of Buffalo*, 14 *N. Y.* 534; *Wilson agt. The Mayor, &c. of N. Y.* 1 *Abb.* 4; *Chemical Bank agt. The Mayor, &c. of N. Y.* *Id.* 79; *Moers agt. Smedley*, 6 *J. C. R.* 28; *Mayor agt. Meserole*, 26 *Wend.* 132; *Wiggin agt. Mayor*, 9 *Paige*, 16, 24; *Van Doren agt. Mayor*, *Id.* 388; *Livingston agt. Hallenbeck*, 4 *Barb.* 9, 16; *Van Rensselaer agt. Kidd*, *Id.* 17; *Bouton agt. Brooklyn*, 7 *How.* 205; *Douglas agt. Mayor*, 2 *Duer*, 110; *Mutual Benefit, &c. Ins. Co. agt. Supervisors of N. Y.* 83 *Barb.* 322; *Same agt. Same*, 8 *Bosw.* 683.)

II. There is no allegation in the complaint, which brings these cases within either of the three exceptions to the general rule, that a court of equity will not entertain an action by a party aggrieved, for relief against an erroneous or illegal tax or assessment. (*Heywood agt. City of Buffalo*, 14 *N. Y.* 534 and 541; *Complaint*, 3-14.)

III. The appellants had several remedies at law for any injury which they might sustain by reason of the imposition and collection of the taxes mentioned in the complaint.

1. They could review the proceedings of the assessors and the supervisors by certiorari. (*Heywood agt. City of Buffalo*, *supra*; *Storm agt. Odell*, 2 *Wend.* 287; *Caledonian Co. agt. Trustees, &c.* 7 *Wend.* 506; *People agt. Brooklyn*, 9 *Barb.* 535.)

2. They had a remedy by prohibition against the supervisors and the receiver and constable (*People agt. Works*, 7 *Wend.* 486).

3. Also by mandamus to compel the supervisors to strike the name and tax from the roll. (*People agt. Albany*, 12 *J. R.* 414; *Ex parte Nelson*, 1 *Cow.* 417; *Hull agt. Oneida*, 19 *J. R.* 260; *Bright agt. Chenango*, 18 *Id.* 242; *People agt. New York*, 10 *Wend.* 393; *Bank of Utica agt. City of Utica*, 4 *Paige*, 400; *People agt. New York*, 18 *Wend.* 605; *People agt. Watertown*, 1 *Hill*, 616; *People agt. Niagara*, 4 *Id.* 20; *Adriance agt. Supervisors of New York*, 12 *How. Pr. R.* 224.)

4. By an action against the assessors and supervisors committing the wrong, for the recovery of the damages sustained therefrom. (*Mygatt agt. Washburn*, 15 *N. Y.* 316; *Saunders agt. Springsteen*, 4 *Wend.* 429; *Ontario Bank agt. Bunnell*, 10 *Id.* 186; *Weaver agt. Devendorf*, 3 *Denio*, 117; *Prosser agt. Secor*, 5 *Barb.* 607; *The People agt. Supervisors of Chenango*, 1 *Kern.* 568.)

IV. The bonds deposited by the appellants with the comptroller of this state, were liable to taxation under the provisions of the act of February 27, 1855. (*Laws of 1855*, p. 44; *International Life Ass. Com. agt. Com. Taxes*, 28 *Barb.* 318; *British Commercial Life Ins. Co. agt. Com. Taxes*, 28 *How. Pr. R.* 41; *Laws of 1853*, pp. 892 and 893, §§ 14 and 15; *Complaints*, fols. 6 and 7.)

V. The judgments below should be affirmed, with costs.

Brief of respondents in reply to appellants' argument:

I. The counsel for the appellants, in the statement of the case which precedes his points, alleges that "these suits ask the judgment of the court whether the plaintiff is liable to two taxes imposed upon it," while the complaint in each action demands judgment "that the defendants, and all of them, may be enjoined and restrained from collecting, receiving and paying over the said tax, and interfering with, removing, selling or disposing of any personal property belonging to the

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said plaintiffs, for the purpose of collecting said tax; and that this honorable court will adjudge that the said defendants, and each and all of them, be forever restrained and enjoined from collecting or receiving the same; and for such other or further relief, or both, as may be just." The whole scope and object of the complaint in each case, is the obtaining of an injunction; and most of the allegations in each would be inappropriate, if any different relief was sought. The learned counsel for the appellants, has, therefore, improperly stated the object of the actions as being "to ask the judgment of the court as to whether the plaintiff is liable to two taxes imposed on it." His complaints are framed to present a case entitling him, as he supposed, to the equitable interposition of the court by way of injunction, and not for the purpose of deciding the abstract question as to whether the appellants were liable to taxation; which decision, if no relief was adjudged under it, could practically be of no benefit or advantage to the plaintiffs.

II. That a court of equity has no jurisdiction to decree an injunction in a case where a tax is alleged to have been illegally imposed, is too well settled by the authorities which have been cited in the respondents' points, to admit of any question; and there is no case suggested in the points which have been presented on behalf of the appellants, and no principle invoked, which in any way establishes or countenances a different doctrine. The argument of the counsel, if well founded, might be applicable were this a certiorari to the assessors to review their assessment, or a mandamus to the supervisors to compel them to remit a tax, or any other statutory or common law writ, the office of which is to correct any error in the assessment of a tax, or to afford a remedy in case the same had been illegally imposed; but the argument is of no force in a case where the equitable jurisdiction of the court by way of injunction is invoked. It does not make out, nor do the complaints state, any case falling under any acknowledged head of equity jurisdiction (*Heywood agt. The City of Buffalo*, 14 N. Y. 538). The uniform current of decisions in this state has always been to the effect that a court of equity had no jurisdiction in cases such as these; and in *Heywood agt. City of Buffalo*, above cited, the point which the respondents urge is fully sustained by this court. In the opinion of Johnson J. (p. 540), it is said: "If the plaintiff failed to make out a case of equitable cognizance in his complaint, he was entitled to no judgment. Because the same court had power to set aside the assessment had all the proceedings been removed to it by the appropriate writ from the inferior tribunal, it does not follow that a party may have the same relief in any other form of proceeding," &c. And again: "Whatever distinctions may have been abolished by the Code of Procedure, this certainly has not."

III. The points made by the appellants, do not in any manner answer the first and second points made on the brief filed by the respondents on submitting their cases; and the court will look in vain through the brief of the appellants to discover any decision which at all detracts from the controlling force and authority of the cases cited by the respondents. The whole argument of the appellants upon the two propositions:

1. That "an injunction will not be granted to restrain the collection of a tax illegally imposed upon the personal property of the plaintiff;" and

2. That "there is no allegation in the complaint which brings these cases within either of the three exceptions to the general rule, that a court of equity will not entertain an action by a party aggrieved for relief against an erroneous or illegal tax or assessment" consists in merely characterizing them as "going far towards the old red sandstone of jurisprudence," and as decided either before the flood or when dry land was first beginning to appear." Such criticisms,

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unsupported by authority, are not arguments, and lose any force or effect, when it is recollected that the whole doctrine contended for by the appellant was in the case of *Heywood agt. The City of Buffalo*—certainly not an antediluvian adjudication—expressly repudiated, this court deciding therein that a court of equity would not interfere or exercise jurisdiction in relation to a tax or assessment, except in three certain, well defined classes of cases, within none of which exceptions does the case made by the appellants fall.

IV. Again, referring to the other points made by the counsel for the respondents in the brief heretofore filed, it is respectfully submitted that the judgments appealed from should in all respects be affirmed, with costs.

LEONARD, J. The question presented in this case has been passed upon by this court adversely to the plaintiffs (14 *N. Y.* 534). Assuming, as the complainant alleges, that the assessment is illegal, the plaintiffs have, or had, at least two complete remedies at law. The assessment might have been reviewed and corrected by certiorari, or have been stricken from the roll by mandamus. These remedies are adequate for the plaintiffs, as there is abundant authority to show, cited by the learned counsel for the respondents; where there are such remedies fully adequate, the aid of a court of equity cannot be evoked. The case principally relied on by the counsel for the appellants to maintain these actions, was determined in 1863, since the judgments were entered in the courts below, and is reported in *The People agt. The New England Mutual Life Insurance Company* (26 *N. Y. R.* 303). That case was submitted on a statement of the facts agreed on by the respective parties, under section 372 of the Code. In the court below the tax was held to be legal, and judgment was rendered against the company for the recovery of the amount; upon an appeal to this court that judgment was reversed, and the assessment held to be illegal. No objection was raised to the determination of the question. On the contrary, both parties asked the determination of the legality of the tax.

In the case at bar, the objection is specifically raised, based upon the decisions of this court, that a court of equity will not take cognizance or grant equitable relief by injunction, where full relief can be obtained at law. The appellants cannot be aided by the decision in 26 *N. Y. R.*, without overturning prior authority in this court, in no respect

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inconsistent with that decision. It has been held by this court that the act of 1853 (*Sess. Laws, chap. 463*), for the incorporation of life insurance companies, and in relation to the agencies of foreign companies, repeals so much of chapter 51, of laws of 1851, as required the deposit by foreign companies of \$100,000 with the comptroller; but it is unnecessary to go into the merits of this question, inasmuch as it appears from the decisions that no relief can be administered in equity, where the remedies at law are adequate for the attainment of justice.

The judgment appealed from must be affirmed, with costs.

COURT OF APPEALS.

ROBERT COLEMAN, respondent agt. AARON H. BEAN, appellant.

In an action upon an *undertaking* given in an attachment suit, after verdict and judgment in the latter suit, the defendant—the surety in the undertaking—cannot introduce testimony on the trial to show in contradiction of the recitals in the undertaking, that no application had been made for the discharge of an attachment in the action in which the undertaking was entitled, and that no attachment had been issued or granted.

It is not essential to the validity of the undertaking that the plaintiff should compel its execution by actually suing out an attachment and making a levy.

It is competent for the parties to the action to *waive*, if they choose, the issuing of an attachment and a seizure of property under it, and for the defendant to give, and the plaintiff to accept, in consideration of the waiver, such an undertaking as the defendant would have been required to give in an application to discharge an attachment actually issued and levied.

The fact that the defendant has put in an undertaking, which recites that an attachment had been issued, and that he was about to apply for its discharge, is conclusive evidence of *such waiver*. It is enough that the undertaking is binding between the principal parties, under such circumstances, to hold the sureties.

Where such an undertaking has been procured by the *agent* of the plaintiff, and the plaintiff having received it upon a valid legal consideration, and being ignorant of any false or fraudulent representations alleged to have been made by his agent in obtaining the undertaking, and in no way responsible for it, such fraud cannot be set up to deprive him of the benefit of the undertaking.

September Term, 1866.

APPEAL from a judgment of the court of common pleas

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of the city of New York, affirming a judgment in favor of the plaintiff, upon the decision of a single judge.

On the trial in May, 1859, before Judge BRADY, without a jury, the plaintiff put in evidence an undertaking in writing, bearing date the 21st December, 1857, entitled in an action in the supreme court, wherein the plaintiff in this action was plaintiff, and the Galveston, Houston and Henderson Railroad Company was defendant, and executed by the defendants herein under their hands and seals. The body of the undertaking was in these words: "An attachment having been issued in the above entitled action, to the sheriff of the city and county of New York, and the above named defendant having appeared in such action, and being about to apply to the officer who issued such attachment, or to the above mentioned court, for an order to discharge the same, we (naming the defendant herein) do hereby pursuant to the statute in such case made and provided, in consideration of one dollar to each of us in hand paid, undertake in the sum of \$1,300, that we will on demand, pay to the above named plaintiff, the amount of the judgment which may be recovered against the above named defendants in this action, not exceeding the above mentioned sum."

It was admitted at the time of the execution of said undertaking, the action in which the same is entitled was pending, and that the defendant in said action had appeared therein by attorney, and that the plaintiff subsequently recovered judgment therein for \$775.28, and demanded payment thereof before this suit was brought upon said undertaking.

The plaintiff having rested his case, the defendant Bean, offered to prove that the Galveston, Houston and Henderson Railroad Company, fraudulently induced the defendant in this action to execute the undertaking by representing that in said action a warrant of attachment had been issued to the sheriff of New York against the property of said company as a foreign corporation, and that the sheriff had seized a large amount of property, and that in order to release it and restore it to the possession of the company, it was necessary that the defendant should execute such undertaking;

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all of which representations the defendants offered to prove were false.

The defendants also offered to prove that the pecuniary consideration expressed in the undertaking, was not paid or agreed to be paid.

The court, on objection, excluded the testimony offered, and the defendants excepted.

The judge found that the undertaking was made and executed by the defendants, under their hands and seals, and found also the other facts above stated, and decided that the plaintiff is entitled to recover of the defendants the amount of his said judgment, with interest, to which the defendants' counsel excepted.

Judgment was entered upon said decision in favor of the plaintiff, and affirmed on appeal to the general term, and the defendant Bean has appealed to this court.

BURRILL, DAVIDSON & BURRILL, *attorneys, and*
JOHN E. BURRILL, *counsel for appellant.*

First. Although the instrument on its face purported to have been executed in pursuance of the statute, and the complaint alleged that it was executed and delivered as a proceeding in the action; in view of the facts offered to be proved, there was no authority to take or receive such an undertaking, and as a statutory security it was a nullity.

Under the 240th and 241st sections of the Code, such an undertaking could only be given on an application to discharge an attachment against the property of the defendant; and even when so authorized, the undertaking should have been to the court, or the officer by whom the attachment was issued (*Code*, §§ 240, 241).

Second. The defendant was not *estopped* by the recitals in the undertaking from proving that no attachment had ever been granted or issued, and that no application had been made to discharge an attachment against the company named in the undertaking.

1. The plaintiff knew that he had not applied for any attachment, and (so far as the evidence shows) that he had no intention or design to apply for such attachment.

2. The plaintiff, therefore, was not in any respect misled by the statements in the undertaking, and did not do any act or take any steps in reliance thereon. (*Cadwell agt. Colgate*, 7 Barb. S. C. R. 254; *Dezell agt. Odell*, 3 Hill's R. 215; *Walker agt. Paine*, 31 Barb. R. 213).

3. In all the cases in which it has been held that the obligor was *estopped* by the recitals in the instrument, either the obligor has had the benefit of the instrument, and secured the advantages which the instrument was intended to secure, and has retained such benefit or advantages, or the obligee has relied upon the faith of the facts recited, and upon the delivery of the security, and has been in

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such reliance induced to do, or to refrain from doing something which he otherwise would have done. An examination of the authorities relied on by the court below, in its opinion, and those cited by the opposing counsel, will show this to be the case.

4. The distinction between the present case and cases in which an obligor has been held to be *estopped* by recitals, is shown in the following: *Cadwell agt. Colgate* (7 Barb. 254); *Brown agt. Miller* (6 Hill, 496); *Homan agt. Brinkerhoff* (1 Denio, 184).

5. Even if it be held (as some cases hold) that where an attachment has in fact been issued, although irregular, the defendant, who has given a bond, cannot dispute its regularity or validity; and that where property has been seized under process, although invalid, and has been delivered up, the defendant is in like manner precluded from disputing the validity of such seizure; still, when, as in this case, the entire statement was a fabrication, and the plaintiff knew that no attachment had been issued or granted, and that no property had been seized, we submit that there is no principle upon which an *estoppel* can rest.

6. Again, under the evidence offered and excluded, the statements and representations set forth in the written instrument, were not the statements and representations made by the defendant to the plaintiff, but were in fact the reverse; that is, they were statements and representations made on behalf of the plaintiff to the defendant, and which the latter believed to be true, while the former knew them to be false.

If, as we offered to prove, the defendant, in ignorance of the truth, had been induced by fraud to subscribe an instrument containing false recitals, known to be so by the party who received the instrument, there can be no *estoppel* (*Mead agt. Brown*, 32 N. Y. 279).

Third. The court erred in excluding the evidence offered by the defendant to show that he was induced to execute the instrument by means of false and fraudulent representations and statements, in regard to the issuing of the attachment and the seizure of the property by the company, and which were introduced as recitals in the instrument.

I. It was a part of the offer that the recitals in the undertaking were false, and made with a fraudulent intent.

II. The representations were material, and had (as the offer states) a controlling influence on the defendant, and were the means of inducing him to execute the instrument.

III. Since the re-organization of our judicial system, it is competent in all cases and with respect to all classes of instruments, to show that their execution and delivery were procured by fraud.

IV. The court below, as its opinion, concedes the proposition in this regard contended for, and seems to admit that had these representations and statements been made by the plaintiff personally, the defense would have been established, but justifies the rejection of the evidence on the ground, erroneously assumed, that the plaintiff neither in any way participated in them, or knew of their having been made.

In this the court erred.

1. The undertaking was not delivered to the plaintiff, but to the secretary of the company; and in procuring its execution and delivery, he acted for the benefit and on behalf of the plaintiff.

There must have been some negotiation between the plaintiff and the secretary about the undertaking. It was for the benefit of the plaintiff, and no one else was interested in procuring it. The secretary was not the agent of the defend-

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ant, and there is no pretence that the defendant had any interest in the matter. Under the offer made, the company had no interest to give or procure the undertaking; and in the absence of the evidence, which it was in the power of the plaintiff to furnish, and which he did not furnish, and which he prevented the defendant from furnishing, in regard to the circumstances under which the undertaking was obtained, the presumption and legal inference is, that the secretary in procuring the certificate, acted as the agent and on behalf of the party for whose benefit the security was obtained.

2. But aside from this, the plaintiff at the time he received the instrument, which recited the same statements made by the secretary, knew that the statements so recited were false; and he also knew from the instrument, if in no other way, that the defendant executed it in the belief that an attachment had been issued, and that an application had been made to the court to discharge the same. And he knew also, from the instrument, that the defendant executed it in pursuance of the statute. And he knew that these representations were false, and that there had been no intent or design on his part to comply with the provisions of such statute.

The circumstances under which the plaintiff took the instrument, in connection with the recitals, all of which were known to the plaintiff to be false, are sufficient to charge the plaintiff in respect thereto.

3. The plaintiff, by accepting the instrument with such false recitals, and knowing them to be so, in effect made the same statements and representations which are embodied in the instrument.

4. Had the evidence offered in respect to the falsity of the statements in the instrument been received, the fact that the plaintiff accepted it with false recitals, known to him to have been false, and shown, according to the evidence offered, to have been made with a fraudulent intent, would have been sufficient to have carried the cause to the jury on the point whether the plaintiff was connected therewith, or participated therein.

V. As before remarked, the court tried the cause upon the theory that the recitals in the undertaking, which defendant sought to falsify, were statements and representations made by the defendant to the plaintiff, and on the faith of which the plaintiff acted; whereas in fact, as we offered to show, such statements and representations were made to the defendant by and on behalf of the plaintiff, and were in fact false and fraudulently made. We offered to show that we had been defrauded, and the court prevented us from so doing, on the assumption that we were the guilty party, and were, therefore, *estopped*.

It is very clear that the scheme was concocted between the plaintiff and the secretary of the company. The plaintiff wished to secure his claim, and to procure the defendant and his co-obligor to become responsible for it. And for this purpose it was represented that an attachment had been issued against the company, and its property seized, and that the interests of the company required that the attachment should be discharged and the property released, and that an undertaking was necessary; and the defendant, for the purpose of relieving the company from their fancied embarrassment, signed the bond. Had the defendant been permitted, he doubtless would have been able to have exposed the whole fraud; but we were precluded from so doing, and the principle (for the first time, as we think) established, that an obligor who executes an instrument in which the obligee has fraudulently made false recitals, is *estopped* from showing such fraud.

Fourth. There was no consideration for the undertaking; and under the facts offered to be proved in connection with the want of consideration, plaintiff was not entitled to recover.

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1. The instrument was not a statutory obligation, and hence no consideration can be implied.
2. There was no evidence to show any consideration, in fact ; and the defendant offered to show that there was no consideration.
3. The defendant was not *estopped* from showing a want of consideration, by the recital in the instrument of the nominal consideration therein expressed.
4. But even if the defendants were precluded from denying the payment of the nominal consideration expressed, still he was not liable on the undertaking, for a reason that its execution and delivery had been procured by fraud.
5. An actual consideration would not have destroyed the defense of fraud ; much less can the recital of payment of a nominal consideration have such effect. We offered to show both an entire absence of consideration, and fraud in procuring the execution of the instrument ; and we think the court erred in excluding the evidence.

It placed its decision on the ground of *estoppel*, overlooking the point that there is no *estoppel* where the party in whose behalf the *estoppel* is claimed has been guilty of fraud.

Fifth. The judgment should be reversed.

MATHEWS & SWAN, *attorneys, and*
ALBERT MATHEWS, *counsel for respondent*

First. The execution of the undertaking, as set forth in the complaint (*Fol.* 90), having been admitted in open court, and the same having been read in evidence, without objection, and the breach of the obligation being shown, the plaintiff was entitled to judgment for the amount claimed. And there being no specific objection to any conclusion of law or fact found by the court, the judgment must be affirmed, unless the defendant can show that the court below erred in the exclusion of some material and competent evidence affecting the rights of the defendant.

Second. The defendant's offer to prove on the trial, what statements the secretary of the Galveston, Houston and Henderson Railroad Company had made to the defendant Bean, concerning the attachment and the proceedings under it, when the defendant executed the undertaking, was properly overruled.

I. There was no pretense of collusion or privity in the matter, on the part of the plaintiff. The Galveston, Houston and Henderson Railroad Company and their officers, were in hostility to the plaintiff. The plaintiff had no participation in the statements made by their secretary to that defendant, or any knowledge of their having been made. They were *res inter alios acta*. Whatever may be the rights or remedies, or securities, between the railroad company and the defendants, the circumstance alleged could not in any manner affect the defendant's liability to the plaintiff in this action.

II. It was totally immaterial to the defendant whether these particular statements were true or false. He meant to give his undertaking precisely as it was given, to effect the sole object of accommodating the Galveston, Houston and Henderson Railroad Company, by enabling them to use it for precisely the purpose, and in precisely the way they did use it. He did give it. They were the best judges of its necessity and propriety. They meant by this undertaking, to give the plaintiff security for his debt. They did so, and had the fruits of it. They were satisfied, and are silent. Assuredly, it is no excuse for the defendant's refusal to perform his undertaking, to say now to the plaintiff that the Galveston, Houston and Henderson Railroad Company mis-stated to him, the defendant, the

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particular circumstances and motives which led them to ask him for this accommodation. Courts refuse to recognize such a plea in cases where the defense is much more meritorious. (*Bank of Chenango* agt. *Hyde*, 4 *Cow. R.* 573; *Bank of Rulland* agt. *Buck*, 5 *Wend. R.* 66; *Mohawk Bank* agt. *Corey*, 1 *Hill's R.* 513; *Spencer* agt. *Ballou*, 18 [4 *Smith*] *N. Y. R.* 827; *Van Deusen* agt. *Howe*, 21 *Id.* 581; *McWilliams* agt. *Mason*, 81 *Id.* 294.)

III. Inasmuch as the circumstances offered did not relate to the execution of the undertaking, they were technically inadmissible in this legal action to impeach it. (*Church* agt. *Hills*, 8 *Cow. R.* 290; *Belden* agt. *Davis*, 2 *Hall's S. C. R.* 447; *Osterhoud* agt. *Shoemaker*, 8 *Hill's R.* 516.)

Third. The defendant's offer to prove on the trial the non-existence of the facts recited in the undertaking, relating to the attachment and proceedings thereon, were properly overruled. Such evidence would not have been competent to overcome the recitals in the defendant's undertaking.

I. By executing this undertaking under his seal, the defendant has *estopped* himself from impeaching its validity by disproving any fact therein recited, which may be material or necessary to sustain it. There being an entire absence of fraud or duress on the part of the plaintiff, and there being no pretense of any mistake in the execution of the undertaking, and there being no claim that it was executed contrary to law or good morals, or public policy; the recital of the facts concerning the attachment proceedings, was conclusive evidence thereof in this action on the instrument between the parties. This is believed to be an elementary principle, illustrated by innumerable cases, where it has been applied under a great variety of circumstances. (See 1 *Greenleaf's Evidence*, § 23; 1 *Starkie's Evidence*, p. 343; also 3 *Cow. & Hill's Phil. on Ev.* p. 1442.)

1. Upon this principle, the recital of a lease in a deed of release, is held conclusive evidence of the existence of the lease. (*Carver* agt. *Jackson*, 4 *Peters' U. S. R.* 83; *Crane* agt. *Morris*, 6 *Id.* 611.)

2. Likewise in a suit upon the bonds of a county, reciting facts, showing them to have been issued according to law, the obligors were held *estopped* from proving the contrary (*Moran* agt. *Miami Co.* 2 *Black's U. S. R.* pp. 723, 731).

3. And where an agreement to pay for the use of a patent, recited that the plaintiff was the inventor, it was held conclusive evidence thereof, and could not be denied or contradicted (*Bowman* agt. *Taylor*, 2 *Adol. & Ellis' R.* 278).

4. So the obligor in a bastardy bond was held *estopped* from proving contrary to the recitals therein, that the child in question was born in another town, and so not chargeable to the obligees (*Falls & Smith* agt. *Bellnap*, 1 *Johns. R.* 487).

5. And in a suit upon a bond reciting the non-residence of a debtor, and given on the discharge of property from attachment against him, the obligors were held *estopped* from disproving the fact of non-residence. (*Haggard* agt. *Morgan*, 4 *Sandf. R.* 201; *Same case on appeal*, 5 [1 *Seld.*] *N. Y. R.* 428.)

6. So also where a replevin bond recited its being made at the commencement of the suit, it was held the surety was *estopped* from showing the statement false, for the purpose of defeating a recovery on the bond (*Decker* agt. *Judson*, 16 *N. Y. R.* 439).

7. And where an undertaking on an appeal recited the date and amount of the judgment, the undertakers were held *estopped* from showing the facts otherwise (*Levi* agt. *Dow*, 28 *How. Pr. R.* 217).

8. There are numerous apposite cases in other states, which are very explicit upon this precise point. A few are here cited. (See *Sumner* agt. *Glancy*, 3 *Black. R.* 361; *Trimble* agt. *The State*, 4 *Id.* 435; also 8 *Id.* 258; *May* agt. *Johnson*, 8 *Indiana R.* 449; *Guard* agt. *Bradley*, 7 *Id.* 600; *Allen* agt. *Lockett*, 3 *J. J. Marshall's*

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R. 164; Kellogg agt. Beecher, 4 Id. 655; Stockton agt. Turner, 7 Id. 192; Slow agt. Wise, 7 Conn. R. 214; Hunter agt. Miller, 6 B. Munroe's R. 612; see also cases cited by Judge HILTON, in opinion, case, p. 17.)

II. It was wholly immaterial to the defendant, under the circumstances of the case, whether the attachment had issued and levy been made under it, or not. If the evidence had been competent it would have been irrelevant, and could not have affected the issue.

1. The undertaking besides being under seal, and reciting the attachment proceedings, and that it was made pursuant to statute, also recites a pecuniary "consideration of one dollar," to the defendants "in hand paid." This alone was a sufficient consideration to sustain the undertaking as a valid instrument, irrespective of the seal and the other recitals. It was, either at common law or under the statute of frauds, a valid promise "to answer for the debt, &c., of a third person." (Douglass agt. Howland, 24 Wend. R. 85; Payne agt. Ladue, 1 Hill's R. 116; Thompson agt. Blanchard, 3 Comst. N. Y. R. 341; Doolittle agt. Dininney, 31 N. Y. R. 350.)

2. The cases cited and relied on by the appellants (see 1 Denio, 184; 7 Barb. R. 254), where property had been taken by a trespasser acting under a void process, and where bonds had been given to release such property, have no application to this case. In those cases the bonds were void, as procured by duress on the part of the obligee. Here the very offer of evidence involves the admission there was no duress whatever, either lawful or otherwise.

3. If there had been no attachment and no seizure of goods, and no application to discharge the attachment, then the conclusive presumption of law would be, under the evidence in this case, that the undertaking was not delivered to "any court or officer," but in the first instance directly to the plaintiff, and was, therefore, a valid contract made directly between the defendant and plaintiff. (Acker agt. Burall, 21 Wend. R. 605; Same agt. Same [on appeal], 23 Id. 606; Ring agt. Gibbs, 26 Id. 510; Winter agt. Kinney, 1 [Comst.] N. Y. R. 365; Kelly agt. McCormick, 28 [1 Tiff.] N. Y. R. 321.)

4. If there had been no attachment, and no seizure of property under it, and consequently no duress or compulsion used by plaintiff in procuring the undertaking, then it was a valid obligation as a voluntary agreement (although for only a nominal consideration), made by the defendant on the request of the G. H. and H. R. R. Company, for the use of the plaintiff. The usual consideration of a surety's bond or obligation, is merely the request of his principal for his own benefit, and the acceptance of the instrument by the obligee. A surety does not generally receive or expect himself to receive any direct beneficial consideration from the creditor. The actual consideration under such circumstances, passes between the original debtor and the creditor. There was no pretence in this case of the absence of a sufficient and satisfactory consideration between the G. H. and H. R. R. Company and the plaintiff (Case, fol. 37).

5. If there had been no attachment and no seizure of property, and the G. H. and H. Railroad Company had volunteered to give this undertaking, and the plaintiff had accepted it in lieu of an actual seizure of property and a compulsory procuring of the undertaking, and thereupon the defendants (for the benefit of the debtors, and at their request made to him) executed the same for the use of the plaintiff, there was in the plaintiff's forbearance a sufficient consideration to sustain the undertaking, even as a voluntary obligation. (Parsons on Contracts, pp. 373, 379, 435; Winter agt. Kinney, 1 [Comst.] N. Y. R. 365; Church agt. Brown, 21 [7 Smith] N. Y. R. 315.)

Fourth. The offer to disprove the considerations expressed in the undertaking,

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was properly overruled. The defendant was estopped from contradicting these recitals (whether relating to the attachment or the payment of money), for the purpose of disproving the consideration necessary to sustain the instrument, or impeaching its validity. Although the Revised Statutes have removed the conclusiveness of the legal presumption of a consideration arising from the mere use of a seal, and while it may be true that the mere seal itself is now only "presumptive evidence" of "sufficient consideration," and such "presumptive evidence may be rebutted in the same manner, and to the same extent, as if such instrument were not sealed;" it was not competent for the defendant under this statute, or otherwise, to contradict or vary the agreement as respects the consideration therein expressed, for the purpose of defeating its operation. Strictly construed, this statute does not touch the contents of the sealed instrument; it relates only to the legal effect of the mere seal itself. The common law rule, that a written contract cannot be contradicted or varied by inferior evidence, remains unimpaired. The exceptions which allow a mere receipt to be explained, or the consideration of any written agreement to be opened to inquiry, for specific collateral purposes, do not go to the extent of allowing such evidence to defeat the operative effect of the instrument. Even if the pecuniary consideration were in fact unpaid, the defendant (under the very exception to the rule mentioned) can recover it in assumpsit. So the implied or express promise to pay, arising upon such a recital, makes a sufficient consideration, without actual payment. The offer to show it was not agreed to be paid, would be tantamount to an offer to contradict a vital part of the agreement. (*McCartee* agt. *Stevens*, 18 *Wend. R.* 527; *McOrea* agt. *Purmort*, 16 *Id.* 460; *Coon* agt. *Knapp*, 8 [4 *Seld.*] *N. Y. R.* 402.)

I. A variety of other cases may be cited to sustain and illustrate the foregoing propositions:

1. In *Wood* agt. *Chapin* 18 [3 *Kern.*] *N. Y. R.* per *DENIO, J.*), if a consideration be expressed in a bargain and sale deed, "it cannot be controverted by evidence, and it is sufficient, though the amount be merely nominal." (*Jackson* agt. *Alexander*, 3 *Johns. R.* 454; *Jackson* agt. *Fisk*, 10 *Id.* 486; *Jackson* agt. *Florence*, 16 *Id.* 47; *Jackson* agt. *Sebring*, *Id.* 515; *Jackson* agt. *Caldwell*, 1 *Cov. R.* 622.)

2. So the late chancellor held that where a good consideration appeared on the face of a voluntary deed, neither the grantor nor his subsequent creditors could be allowed to deny or disprove the payment of it, so far as a consideration was necessary to give effect to the deed (*Bank of U. S.* agt. *Houseman*, 6 *Paige's R.* 585).

3. Again, the chancellor held in a late case (where the nominal consideration of a conveyance of lands was not paid), that actual payment was not necessary; it was sufficient if it were stated in the deed, and the court ought not to allow proof of the non-payment of such nominal consideration to destroy the deed (*Meriam* agt. *Harsen*, 2 *Barb. Ch. R.* 267).

4. So where an agreement of guaranty under seal, recited the consideration of one dollar, it was held incompetent to prove it not paid, for the purpose of defeating the instrument. (*Childs* agt. *Barnum*, 1 *Sandf. S. C. R.* 58; *Same Case on Appeal*, 11 *Barb. R.* 15.)

5. And where a policy of insurance recited payment of the premium, it was held incompetent to disprove the fact to invalidate the instrument (*Gott* agt. *N. P. Ins. Co.* 25 *Barb. R.* 92).

6. But where an assignment of lease recited a consideration of \$500 paid, and it was proved not paid, the assignor was allowed to recover it upon the implied promise, in an action of assumpsit (*Shepherd* agt. *Little*, 14 *Johns. R.* 210).

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II. If there were any authority in the law to justify the admission of the evidence offered; still, in order to make it available, the defendant should have gone further, and offered to prove not only that these defendants, without any consideration, executed the instrument (*Case*, fol. 37), but also first, that there was no consideration between the plaintiff and the G. H. and H. R. R. Company; and second, that neither they or defendant agreed to waive the actual payment at the time of the one dollar consideration.

Fifth. Even if it had been true that there had been no attachment, and no seizure of property, and no payment of the pecuniary consideration, and the undertaking had been voluntarily given to the plaintiff by the G. H. and H. R. R. Company, without compulsion of process of attachment issued in the suit against them as a foreign corporation, and the defendants were now permitted to contradict the recitals in the undertaking, and to disprove his admission of receipt of the pecuniary consideration, nevertheless, the undertaking having been given by the defendants in that suit, and the plaintiff having waived the issuing of an attachment, and accepted it, such acceptance would have debarred the plaintiff from issuing any other attachment, and procuring any other security from the debtor, and the defendant would have been by an *estoppel in pais*, prohibited from repudiating his undertaking. (*Dewey* agt. *Williams*, 9 *Wend. R.* 65; *Salem* agt. *Williams*, 9 *Id.* 147; *Dezell* agt. *Odell*, 3 *Hill's R.* 215; *Decker* agt. *Judson*, 16 *N. Y. R.* 451; *Walrath* agt. *Redfield*, 18 [4 *Smith*] *N. Y. R.* 457.)

I. If any defense could arise to any body by reason of the G. H. and H. R. R. Company being not liable to attachment, that would have been their own especial privilege, and not available to this defendant (*Stevens* agt. *Lomberger*, 24 *Wend. R.* 275).

II. Although an attachment and seizure of goods were necessary to compel the giving of the undertaking by the foreign debtor, yet he might waive this preliminary proceeding if he (and the plaintiff) thought fit, and give the undertaking without waiting for the visit of the sheriff. If the debtor had thought it more beneficial to them (with the plaintiff's assent) to waive the issuing of an attachment, and a levy under it, or any defect or irregularity in the matter (and thus save damage to his credit, besides annoyance and expense), and the debtor had been willing to assume and admit the existence of the facts alleged in the undertaking, and the plaintiff so to accept it, the parties were perfectly competent to do so; and the undertaking given under such circumstances would be none the less obligatory upon the parties. (*Clark* agt. *Jones*, 1 *Denio's R.* 516; *Golt* agt. *N. P. Ins. Co.* 25 *Barb. R.* 191; *Decker* agt. *Judson*, 16 *N. Y. R.* 444-5; *Kelly* agt. *McCormick*, 28 *Id.* 320.)

Sixth. The judgment of the court of common pleas should, therefore, be affirmed, with costs, together with an allowance of ten per cent.

JAMES C. SMITH, J. The sole question in this case is, whether the court erred in rejecting the testimony offered by the defendant. One branch of the offer was to show in contradiction the recitals in the undertaking, that no application had been made for the discharge of an attachment in the action in which the undertaking was entitled, and that no attachment had been issued or granted. The counsel for the applicant argues that the defendants were not *estopped*

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from thus showing the falsity of the recital, for the reason that, as the counsel assumes, the plaintiff did not rely upon the faith of the facts recited, or upon the delivery of the undertaking, and was not thereby induced to do anything which he would not have done, or to refrain from doing anything which he would have done but for the undertaking.

But the assumption is not warranted by the facts of the case as proved, or offered to be proved. If in truth, no attachment was issued, it may have been for the very fact that the plaintiff relied exclusively upon the delivery of the undertaking, and was induced by it to forbear taking out an attachment and seizing the property of the company. He had commenced an action, and for aught that appears, the case was a proper one for issuing an attachment.

It was not essential to the validity of the undertaking, that the plaintiff should *compel* its execution by actually suing out an attachment and making a levy. It was competent for the parties to the action to waive, if they chose, the issuing of an attachment and a seizure of property under it, and for the defendant to give, and the plaintiff to accept, in consideration of the waiver, such an undertaking as the defendant would have been required to give in an application to discharge an attachment actually issued and levied. By such arrangement the plaintiff would have been debarred from suing out another attachment and procuring other security from the defendant in the same action, and the defendant would have been *estopped* from repudiating his undertaking.

/ We are not to assume, without proof, that the undertaking was executed under circumstances which make it void, but the contrary presumption is to be indulged, if it is consistent with the testimony given and the testimony offered. Although the statute under which the proceeding was had, contemplated that the giving of such undertaking shall be preceded by the issuing of an attachment, and shall accompany an application to discharge it, and also directs that the undertaking shall be delivered to the court or officer, the non-compliance with those provisions is but an irregularity

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which the defendant may waive ; and the fact of his putting in an undertaking, which recites that an attachment had been issued, and that he was about to apply for its discharge, is conclusive evidence of such waiver. It is enough that the undertaking is binding between the principal parties, under such circumstances, to hold the sureties.

Many cases may be supposed, in which it would be to the interest of the defendant to make such an arrangement, for the purpose of avoiding expense, annoyance or damage to his credit, by the publicity of a levy. It cannot, therefore, be assumed that the plaintiff did not rely upon the delivery of the undertaking, and was not induced by it to refrain from suing out an attachment and making a levy ; and if he did thus rely upon it, the defendants were *estopped* from contradicting its recitals.

There is a plain distinction between the present case, and one where an undertaking is given to procure the discharge of an attachment which is void for want of jurisdiction of the subject matter. In the latter case, the whole proceeding being a nullity, the undertaking is of no effect whatever, and the sureties when sued on it may defend on that ground.

Of that nature are the authorities for the appellant (7 *Barb.* 254 ; 1 *Den.* 184), but they are not applicable to the case at bar, in which there is no evidence of a defect of jurisdiction. The case, therefore, is not within the rule suggested by the counsel for the appellant, and the offer to show that the recitals were untrue, was properly overruled.

The ruling was also correct in respect to the offer to show that the defendants were induced to execute the undertaking by the alleged false and fraudulent representations of the agent of the company that the recitals referred to were true. It was not proposed to prove that the plaintiff made any false representations, or that he was cognizant of, or had any agency in the alleged fraudulent conduct of the secretary of the company.

The defendant executed the undertaking, and placed it in the hands of the agent of the company, to be delivered by him to the court or officer, for the benefit of the plaintiff

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or (which is the same thing so far as this point is concerned), to be delivered to the plaintiff himself. It having been delivered by the agent as intended by the obligors, and the plaintiff having received it upon a valid legal consideration, and being ignorant of the alleged fraud, and in no way responsible for it, such fraud cannot be set up to deprive him of the benefit of the undertaking.

As upon the hypothesis that no attachment had been issued, the waiver and forbearance, which may be properly assumed in such case, formed a good consideration for the undertaking; the offer to show that there was in fact no pecuniary consideration price, was immaterial.

The judgment should be affirmed.

NEW YORK COMMON PLEAS.

WM. HENRY ARNOUX agt. J. SMITH HOMANS.

A defendant having served notice of appeal, the mere service of a notice of argument by the plaintiff, does not preclude him from enforcing payment of the judgment; no stay of proceedings having been given or applied for.

General Term, July, 1865.

Before DALY, F. J., BRADY and CARDOZO, Judges.

APPEAL from an order of special term.

DALY, F. J. The plaintiff, by serving a notice of argument after receiving notice of the appeal, did not preclude himself from enforcing the payment of the judgment, for an appeal had been perfected without any stay of proceedings.

There was no waiver of anything. He served a notice of argument, because the appeal was perfected and ready for argument, and proceeded to collect his judgment because the proceedings were not stayed.

The rule that a party who intends to move to set aside proceedings for irregularity, must do so at the earliest opportunity, and waive the right if he takes any subsequent step

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in the cause, has no application in the case. (*Thorpe* agt. *Beer*, 2 *Barn. & Ald.* 372; *Downes* agt. *Withrington*, 2 *Taunt.* 243; *Fox* agt. *Mooney*, 1 *Bos. & Pul.* 250; *D'Argent* agt. *Viviant*, 1 *East*, 330; *Gales* agt. *Caines*, 3 *Cai.* 167; *Hart* agt. *Small*, 4 *Paige*, 288; *Graham's Practice*, 2d ed. 702.)

The plaintiff was, therefore, regular in obtaining the order for the defendant's examination, and could be affected only by an order to stay his proceedings founded upon the filing of a proper undertaking. He might have applied to the court under the 227th section of the Code, for liberty to file an undertaking to stay the proceeding (*Sternhaus* agt. *Schmidt*, 5 *Abb.* 66), but no such application appears to have been made. He asked, it would seem, to dismiss the summary proceedings, and the motion was granted, upon the ground that the plaintiff served a notice of argument after the notice of appeal had been served, which in my opinion, was erroneous.

We can upon the appeal, give the same relief to the defendant that could have been obtained by a motion in the court below, but it should be upon the payment of costs, as the appeal was well taken.

CARDOZO, J. I think section 327 of the Code, furnishes a perfect answer to this appeal. The judge at special term, had the power under that section, to permit the necessary amendment to effect a stay of proceedings (*N. Y. Central Ins. Co.* agt. *Safford*, 10 *How. Pr. R.* p. 344), and the order below must be deemed an exercise of that power; and as it relates solely to a matter of practice, it rested in the discretion of the court below.

But the undertaking is confessedly inaccurate, in that the words "in case the appeal be dismissed," are omitted from the condition. The defendant should be required to amend the undertaking in that respect, or to substitute another; and as neither party is entirely free from error, there should not, I think, be allowed any costs on this appeal, unless the defendant should fail to correct the error in the undertaking.

I think the proper order will be that the order appealed from be affirmed, without costs, provided the defendant

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within five days from the service of a copy of the order to be entered on the decision of this appeal, cause the undertaking to be amended in the respect above mentioned, or substitute another in its place ; and if he fail to do so, then that the order appealed from be reversed, with \$10 costs.

Ordered accordingly.

NEW YORK SUPERIOR COURT.

THOMAS E. BENNETT, receiver, &c. agt. WILLIAM ERVING.

Special Term, May, 1865.

Before GARVIN, Justice.

THIS was an action to set aside as fraudulent, a conveyance to the defendant of a farm in New Jersey.

The defendant's counsel moved to dismiss the complaint, on the ground that under section 33 of the Code, the court had jurisdiction of the actions enumerated in sections 123 and 124, "when the cause of action shall have arisen, or the subject of the action shall be situated within those cities respectively ;" that the words "cause of action," refer to personal actions only, but not to those of this character, and the "subject of the action" being land in another state, the suit would not lie.

The COURT, after consideration, granted the motion and dismissed the complaint.

G. W. STEVENS, *attorney for the plaintiff.*

G. W. COTTERILL, *attorney for the defendant.*

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SUPREME COURT.

GEORGE LAW agt. THE MAYOR, &c., of the City of New York.

Where the common council of the city of New York authorizes the comptroller of the city to *settle a claim in suit* arising on contract, and the comptroller through the corporation counsel, settles the suit accordingly, and the referee to whom the action was referred, makes his report in accordance with such settlement, upon which judgment is entered in favor of the plaintiff against the corporation; there being no irregularity, fraud, collusion or mistake of any facts shown, the corporation cannot set aside the judgment and open the cause for trial at the circuit, merely because a new corporation counsel believes a better result could be obtained by continuing the litigation to the end, in the courts.

*New York General Term.**Argued June 19, 1866. Decided December 15, 1866.**Before BARNARD, P. J., CLERKE and SUTHERLAND, Justices.*

A CONTRACT was made on the 25th of November, 1852, between the corporation of New York, by John T. Dodge, street commissioner, and Henry Conklin, for the work of the Battery enlargement, under a resolution of the common council passed in one year by one board, and in the other year by the other board. Appropriations were from time to time made by the common council in 1853, 1854 and 1855, for payments on the work, which were sanctioned by the tax laws of 1853, chapter 232, of 1854, chapter 263, and of 1855, chapter 141, under which payments to the amount of \$46,000 were made during those years. In January, 1858, the work was stopped by the mayor, &c., by ordinance.

In 1861, April 2, George Law, claiming as assignee of two-thirds of the contract, and by virtue of a power (coupled with an interest) as to the other one-third, presented to the comptroller (as required by the act of 1860, chapter 379), his claim of \$23,643.35 for work done about the job, and \$20,000 damages for breach of the contract.

This not being responded to, he commenced a suit May 1, 1861, and issue was joined in February, 1862. The issues were on motion, and after opposition, by order referred to John B. Haskin, Esq., referee, to hear and determine, on

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the ground that it involved the examination of a long account. A resolution was passed by the common council, June 11, 1863, authorizing the comptroller to settle and adjust the claim. Various negotiations for a settlement of the claim took place.

While the reference was pending, and after considerable proof had been taken, the corporation counsel in the latter part of 1865, upon the suggestion, and with the concurrence of the comptroller, made a proposition in writing, to adjust and settle the claim, by allowing the amount claimed for work done and interest. This proposition was accepted in writing by plaintiff's counsel, and a report in accordance with the stipulation was made by the referee, by which the whole amount of the account for work done under the contract, at contract prices with interest, was allowed.

Notice of application for judgment was given Mr. O'Gorman, in pursuance of the act of 1865, and the new rule of this court, and the entry of judgment specially ordered by Judge SUTHERLAND.

A motion was made before Judge CLERKE: 1. To set aside the judgment. 2. To vacate and annul the stipulation signed by the former corporation counsel. 3. To vacate the report of the referee and the order of reference. 4. That the case be set down for trial before a jury or another referee.

The reasons assigned for this motion by the present corporation counsel are:

1st. That the contract was not legally made or executed; the resolution directing it having been passed by one board in one year, and by the other board in a subsequent year.

2d. That various allegations in the complaint excusing performance within the time prescribed by the contract were untrue, or without foundation in fact or in law.

3d. That various legal questions arose: 1st. As to the legality of the contract. 2d. As to excuses for non-performance in the time prescribed. 3d. As to a set-off that ought to be allowed. And lastly: "That in a case so surrounded by doubtful questions as this, it should await the authoritative

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decision and guidance of the court, before paying the public money to any claimant, no matter how respectable."

The motion was heard before Judge CLERKE, who granted it as asked, and ordered the case placed on the calendar for trial before a jury.

From this order the plaintiff appealed. The appeal was argued in June last before the justices above named.

H. W. ROBINSON *and*

WALDO HUTCHINS, *for plaintiff and appellant.*

I. The case was not within the act of 1859, chapter 489 (*See Laws 1859, p. 1127*), section 5, which authorizes the comptroller, where he had reason to believe a judgment against the mayor, &c., of the city of New York, was "obtained by collusion or founded in fraud," to take all necessary and proper means to open and reverse the same.

No such imputation is cast on this transaction, nor has the comptroller attempted to question the correctness of acts done under his direction.

II. The case disclosed by the affidavits and papers, showed nothing to warrant any such interference by the court.

1. Although section 174 of the Code allows the court to relieve a party from a judgment "taken against him through his mistake, inadvertence, surprise or excusable neglect," no case of such character is made by the affidavits on the part of the defendants, the mayor, &c., of New York.

(a) What Mr. O'Gorman's affidavit states, outside of the pleadings and documents, is mere heresay.

(b) There can be no pretence of fraud, mistake, inadvertence or surprise.

The plaintiff's claim for \$23,643.35 (the amount of work conceded to have been done and unpaid for), and for \$20,000 damages, was presented to the comptroller in April, 1861.

The suit was commenced in May, 1861. No answer was put in till February, 1862. On June 11th, 1863, the common council authorized its settlement. Negotiations were

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from that time pending, until the final settlement in December, 1865.

Then the comptroller receded from the demand to set off part of the \$10,000 claimed as due the corporation for filling in the Battery, and from his refusal to allow only the principal of the claim.

The proposition to settle, as finally agreed upon, came from the comptroller—was submitted to plaintiff by the corporation counsel in writing, accepted in writing, and stipulations given accordingly.

By the settlement made, the corporation abandoned the claims to a set-off, and the plaintiff conceded and abandoned on his part, the claim to \$20,000 damages for breach of contract, and his claim for the material of the old Battery wall (*Fol.* 140).

There is no allegation on the part of the comptroller or corporation counsel Develin, who acted in this transaction, that they labored under any mistake, inadvertence or surprise. Nothing is shown to establish or prove any such error on their part. The only suggestion now made on the part of the present corporation counsel is, that those officers did not appreciate the force of certain legal propositions which he seeks to re-introduce into the case.

The protracted and repeated consideration of the merits of the case by the common council, and by the officers of the corporation, and their execution of the proper papers to carry their views into effect, preclude any idea of mistake of fact, inadvertence to any rights of the corporation, or any surprise in making their offer of judgment, and entering into the written stipulation with plaintiff for a settlement of the controversy. No neglect on the part of either party is alleged.

The court, by the order granted, has assumed to pass judgment upon the acts of the comptroller and (former) corporation counsel, and to decide at least (without suggestion of either of them), that the settlement they made was founded on some mistake or misconception on their part of the facts of the case.

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It has also decided and held that the written stipulations entered into between the parties, and the rights which the plaintiff acquired thereunder, should be vacated and annulled.

It has also decided that the corporation are prejudiced by a compromise which the comptroller and corporation counsel determined to be for its interest ; and this without being made acquainted with all the facts or proofs ; and when those authorized to act in the matter were of a different opinion, and decided differently, and committed their decision to the form of a stipulation and written agreement.

The charter of the city (*Laws of 1857, vol. 1, p. 879, § 22*), gives the comptroller absolute authority to settle and adjust all claims in favor of, or against the corporation. But upon mere vague suggestion that by possibility a different conclusion might have been arrived at, at the end of litigation to be protracted for years, such a settlement is vacated and held for nothing. No case can be found to warrant any such decision.

The order is a reversal by one judge, of orders previously granted by another, viz :

1st. The order of reference of the action to a referee to hear and determine on proper cause shown, and after opposition.

2d. Order for judgment, after due notice given, and no cause assigned in opposition thereto.

The motion to open the judgment should be denied, and the order appealed from reversed, with costs.

RICHARD O'GORMAN *and*

JOSE E. BURRILL, *for defendants and respondents.*

I. The contract was not binding on the corporation, because the resolution under which it was executed passed the different boards of the common council in different years (*Wetmore agt. Story, 22 Barb. 494*).

II. The contract having been invalid in its origin, was not rendered operative or effectual by the subsequent action of the common council.

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1. The proceedings referred to were not taken for any such purpose, or with any such intention.

2. Such proceedings were incapable of producing such results. (43 *Barb.* 49 ; 20 *N. Y. R.* 312 ; 21 *Bow.* 173 ; 20 *How. Pr. R.* 395.)

III. If the contract were valid, the plaintiff could not recover on the contract.

1. The contract never was performed. "There must be full performance to entitle a party to recover." (*Smith agt. Brady*, 17 *N. Y. R.* 173, 187 ; *Champlin agt. Rowley*, 13 *Wend.* 258 ; *S. C.* 18 *Id.* 187.)

2. Even if the surveyor in charge of the work had given directions to suspend operations, such directions did not excuse the plaintiff's failure to perform, because he had no power to alter the contract in any respect, or dispense with a full performance of it. (*Bonesteel agt. The Mayor*, 20 *How.* 240 ; *S. C.* 22 *N. Y. R.* 166.)

3. The fact that the rip-rap wall was not in a condition to receive the parapet wall, whether owing to the manner in which the work was done, or to the nature of the work, does not excuse the failure to comply with the contract, because these risks were assumed by the contractor.

4. The existence of the leases of the two piers, did not excuse the default of the contractor.

(a) The contract was entered into with full knowledge of the existence of the Vanderbilt lease ; and this, moreover, expired before the time limited by the contractor for doing the work.

(b) The lease of the East river pier was made for the benefit of Law, and at his request, he then being one of the managers of the ferry company.

(c) It is not pretended that the failure to complete the contract was owing to the existence or making of the leases.

(d) On the contrary, it is stated by the surveyor in his report (volume 69 of the proceedings of the Board of Aldermen, pages 114 to 128), that the work had not reached the place covered by the leases, and that the adjacent space was

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left open at the request and for the benefit of the contractor, to make an entrance to the work.

(e) Even assuming that the corporation acted improperly and unjustifiably, still, unless its misconduct occasioned the default and failure of the plaintiff, it cannot avail the plaintiff.

IV. It is not correct that the corporation desired to take any undue advantage of the plaintiff, or to deal with him harshly or unjustly; for although he had no right to recover on the contract, and they could legally have refused to pay him anything (17 *N. Y. R.* p. 187), they passed a resolution authorizing the comptroller to adjust the amount "justly due and payable." (*Resolution, June, 1863, vol. 31, Joint Proceedings, p. 176.*)

V. All that is asked by the corporation counsel is, that the amount "justly due and payable," and no more, shall be awarded.

1. Applying the principles of the resolution, and adjusting the amount on the basis of a *quantum meruit*, the contract must be left out of consideration, and the work done estimated at its actual value, in the same manner as if no contract had been made.

2. But in the settlement had, the work has been estimated at the contract price, in the same way as it would have been had the plaintiff performed the contract.

3. And while the contract has been followed for the purpose of charging the defendants, its provisions have not been applied against the plaintiff. No credit has been allowed for the \$7,500 due for the filling in; nor for the loss sustained by the city for the delay in the work; nor for the damage sustained by them by reason of the work having been left in an unfinished state.

4. If the work done be estimated at its fair and actual value, without reference to contract price, the money already paid to him will be found to exceed the amount of his claim.

VI. It is by no means clear on the authorities, that the common council had any right to make any adjustment of the claim, or to authorize the comptroller so to do, in a case

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where the claim arises on a contract not binding on the corporation. (See 43 Barb. 49; 20 N. Y. 312; *Brady agt Mayor, S. C. 2 Bosw.* 117.)

VII. It is admitted that in the settlement made, amount allowed is in excess of what the plaintiff is entitled to, and that the settlement has been in error, and under a mistaken view of the principle and measure of compensation—and that if the settlement be carried into effect, the plaintiff will obtain a larger sum of money, to which he is not entitled, if our views be correct, and that for these reasons relief should be granted. (5 Abb. R. 487; 26 Barb. 263; 9 Abb. 435; 11 Id. 69; 18 How. Pr. 576; *Grier agt. The Mayor, Op. MONELL, J.*)

VIII. It must be evident that the statement of the case as made on the affidavits, that the objections presented by the defendants to the claim are substantial, and involve legal questions which should be left to the court to determine, and which the interests of the city require should be settled.

IX. The report of the referee was not warranted by the stipulation, nor should the court be called upon to render a judgment based on the report of the referee, purporting to find facts, and to render a decision thereon, when there was no evidence to sustain these facts, and the referee never passed upon or decided them.

X. The action of the comptroller, to whom the plaintiff's claim was first presented, in rejecting it, and that of the counsel to the corporation, under whose advice that action was originally defended, and the repeated action of the common council in respect to this claim, furnish strong evidence that the claim lacked equity, and ought not to be allowed; and that the settlement which we ask to have opened, was made without that full understanding and knowledge of the facts which was possessed by the former officer of the corporation, who had previously so emphatically rejected it.

XI. Mr. Law is not prejudiced by granting the motion.

On the theory of his counsel, he has voluntarily thrown away a large sum of money which he will inevitably recover if the matter be submitted to a judicial investigation.

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On our theory he has received more than he is fairly entitled to, and should not retain that which is not due him, and which has been awarded improvidently or inadvertently by those who hold responsible positions of public trust.

XII. The order should be affirmed.

By the court, BARNARD, J. I can find no principle of law to sustain the order made at special term. It is not questioned but that the plaintiff had done work under the contract with the city for the enlargement of the Battery, which at the contract prices, with the interest added from the time when the work should have been paid for, was equal to the judgment. It is true that the contract was not performed, but the city may rescind an entire contract, or may waive a full performance and pay for the work actually done. The city also would be legally liable for the contract price of the work done, and for damages in case the non-formance of the contract was occasioned by its act.

The action is brought upon this alleged fact. The papers disclose a report of a committee of the common council of New York upon the work, going very far to sustain the plaintiff's claim; but it seems to me that the time for the argument of this question is passed. The common council authorized the comptroller to settle the claim in suit. The comptroller did settle it. The corporation counsel, by authority of the comptroller, allowed the plaintiff's claim for work actually done at contract prices. The plaintiff abandoned his claim for damages, and also his claim for the materials in the old Battery wall. The referee, upon the agreement of the parties, made his report in accordance with this agreement, and judgment was ordered by Justice SUTHERLAND, upon notice, as required by the law of 1865. There is no irregularity; there is no fraud; there is no collusion; there is no mistake of facts claimed or shown by the papers. The city has compromised a claim in suit, and the claim as thus established, has passed into a judgment, and it is proposed to set aside this judgment for the sole reason that the new

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corporation counsel believes a better result could be obtained by continuing the litigation to the end in the courts.

The city cannot avoid a settlement fairly made with the plaintiff upon such ground.

The order should be reversed, with costs.

SUTHERLAND, J., concurred.

CLERKE, J., dissented.

NEW YORK COMMON PLEAS.

THE PEOPLE OF THE STATE OF NEW YORK AND THE BROADWAY AND SEVENTH AVENUE RAILROAD COMPANY, respondents agt. THE HUDSON RIVER RAILROAD COMPANY AND THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, appellants.

The Hudson River Railroad Company have no authority, either with or without the consent of the corporation of the city of New York, to extend their tracks from Chambers street through College Place and Warren street, to Broadway, in the city of New York.

General Term, December, 1866.

Before DALY, BRADY and CARDOZO, Judges.

THIS was an appeal from a decision at special term granting an injunction restraining the defendants from running a branch to Broadway.

The following facts appeared: Resolution passed by the board of aldermen and the board of councilmen of the city of New York, December 20th, 1864, and approved by the mayor the same day:

“Resolved. That the Hudson River Railroad Company be, and they are hereby, permitted to extend their tracks from Chambers street through College Place and Warren street, to Broadway, for the use of their city cars, and to lay a side track in Hudson street from Canal to Chambers street, and turn-outs in front of their depot property in Twenty-ninth and Thirtieth streets; and also to extend their Eleventh

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avenue track to connect with their Tenth avenue tracks, through Fourteenth street."

By the charter granted to the Hudson River Railroad Company in May, 1846, that company was authorized to locate their railroad on any of the streets of the city of New York westerly of and including the Eighth avenue, and on or westerly of Hudson street, but was prohibited from using any track or line of road contiguous to or alongside of the track of the railroad corporation known as the Harlem Railroad Company, and are also prohibited from running nearer to the track of the said Harlem Railroad Company on the island of New York, than the Eighth avenue and Hudson street, in the city of New York. .

A. R. LAWRENCE, JR., *and*

H. W. ROBINSON, *for respondents.*

J. H. MARTINDALE, *Attorney General, for People.*

I. The defendants, the mayor, aldermen, and commonalty of the city of New York, have no power, either by resolution or ordinance, to grant to a corporation or an association of persons, the right to maintain and construct a railway in one of the streets for the transportation of passengers for private gain, and a resolution of the common council granting such right is void. (*Milbau agt. Sharp*, 27 N. Y. 611; *Davis agt. The Mayor, &c.* 14 *Id.* 506; *People agt. Kerr*, 27 *Id.* 188.)

It is clear then, that the resolution of December 20th, 1864, is void, unless some special statutory authority can be found by which the legislature have—as far as the defendants, the Hudson River Railroad Company are concerned—delegated to the corporation of the city such right.

II. The only special statute which affects this case, is the act of May 12th, 1846, entitled: "An act to authorize the construction of a railroad from New York to Albany" (*Laws of 1846*, p. 274).

The fourth section of the act of 1846, provides as follows:

"The said directors may locate their railroad on any of

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the streets or avenues of the city of New York westerly of and including the Eighth avenue, and on or westerly of Hudson street, provided the assent of the corporation of said city be first obtained for such location ; but the said railroad company shall not infringe upon the rights or privileges of the Harlem Railroad Company, heretofore incorporated, by using any track or line of the road contiguous to or alongside of their track, nor by running nearer to any such track on the island of New York than the Eighth avenue and Hudson street, in the city of New York ; nor shall the said Hudson River Railroad Company locate any part of their line east of or within one mile of the said Harlem Railroad, in the county of Westchester. Nor shall the said Hudson River Railroad Company locate any part of their line or lines upon a grade exceeding twenty-five feet to the mile."

From the above it is obvious that the defendants, the Hudson River Railroad Company, are prohibited from locating their railroad on any of the streets or avenues which are eastward of the Eighth avenue or Hudson street ; that they cannot make even this location without the permission of the corporation ; and that to make the prohibition still more imperative, the legislature have directed that they should not run their track nearer to the track of the Harlem Company than the Eighth avenue and Hudson street.

Again, the corporation of the city are only authorized to give a permission to the railroad company to run on streets which include or are westerly of the Eighth avenue or Hudson street.

To that extent, but no further, are the powers of the corporation enlarged.

Without the action of the legislature, they would have had no power over the subject (*Cases supra*).

It appears from the complaint that College Place and Warren street and Broadway, lie south-easterly or easterly of the line of the Eighth avenue and Hudson street (*Complaint, fols. 29-31*), and nearer to the track of the Harlem Railroad Company than the Eighth avenue and Hudson

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street (*Id.*). The resolution of December 20th, 1864, is therefore simply void.

III. The proviso contained in the fifth section of the act of 1848 (*Laws of 1848, p. 43*), does not aid the defendants, nor affect the question presented by the papers in this case, because the location of a track *easterly* of the Eighth avenue or Hudson street, would not be lawful with or without the assent of the corporation of the city of New York.

IV. The resolution is also void, because it is in violation of the charter of the city of New York, and of the acts of the legislature of 1854 and 1860, referred to in the complaint. (*Laws of 1854, p. 323; Laws of 1860, p. 16.*)

V. The railroad tracks laid down by the defendants, the Hudson River Railroad Company, being an unauthorized obstruction of a public street or highway, constitute a public nuisance (*Davis agt. The Mayor, &c. of New York, 14 N. Y. p. 506*).

As such their continuance can be restrained, and their removal ordered at the suit of the people. (*Attorney General agt. Cohoes Co. 6 Paige, 133; People agt. N. Y. and Harlem R. R. Co. 26 How. 53; Davis agt. The Mayor, &c. 14 N. Y. 526, and cases cited.*)

VI. The complaint shows that the tracks in question are specially injurious to the plaintiff, the Broadway and Seventh Avenue Railroad Company; that they interfere with the prosecution of their business, and affect their gains and emoluments (*Complaint, fols. 36, 41*).

Those plaintiffs are, therefore, entitled to the relief which they ask in this action. (*Milbau agt. Sharp, 27 N. Y. 612; Doolittle agt. Supervisors of Broome, 18 N. Y. 160; Corning agt. Lawrence, 6 Johns. Ch. 49.*)

VII. The pretence set up that the branch road constructed from the west side of Church street east to Broadway, was by way of station accommodation, is a mere apology for a violation of the prohibition of the statute.

No necessity existed, even if the station accommodations were required, of running tracks in that direction, instead

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of running them to the west, and keeping within the letter and plain intent of the statute.

The necessity which would justify such a proceeding as within the intent of the statute, though contrary to its letter, must be extreme and overwhelming, and the defendants presented no such case.

VIII. The order appealed from should be affirmed, with costs.

T. M. NORTH, and C. A. RAPALLO, *for appellants.*

By the court, DALY, J. An injunction was granted in this case, restraining the defendants from extending the track of their railroad through Warren street to Broadway.

It is very clear that the defendants have no authority to do so, unless it is conferred upon them by their act of incorporation. (*Milbau agt. Sharp*, 27 N. Y. 612; *Laws of N. Y.* 1864, § 323; *Laws of N. Y.* 1860, § 16.)

By the first section of the act (*Laws of New York*, 1846, p. 272), they are authorized to construct a railroad between the cities of Albany and New York, commencing in the city of New York (the consent of the city being obtained), with power to construct such branch or branches for depot and station accommodations, as may be required for the business of the road, and the fourth section of the act declares that the road may be located on any of the streets or avenues of the city of New York *westerly* of, and including the Eighth avenue, and on or *westerly* of Hudson street; *provided*, the assent of the corporation of the city be first obtained for such location; but that the defendants shall not infringe upon the rights or privileges of the Harlem Railroad Company, by using any track or line of the road contiguous to or alongside of their track, nor by running nearer to it on the island of New York than the Eighth avenue and Hudson street.

The power to construct branches for depot or station accommodation, is, as respects the city of New York, limited to the space designated by the act, as that within which the

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railroad may be located in the streets or avenues of the city ; that is, on or *westerly* of the Eighth avenue or Hudson street, and the limit of Hudson street is, I think, fairly designated by the act as the point of commencement ; or it may be that branches may be extended for depot or station accommodation beyond that, *westerly* of such a line as would exist if Hudson street were continued on the same parallel as at present to the river.

That this is the fair construction of the act, and was the obvious intention of the legislature, I entertain no doubt. The construction for which the defendants contend, would entitle them, whenever they thought their business required it, to run branches through any part of the city below Chambers street, the narrowest, the most crowded with vehicles, and the most essential for business purposes of any part of the city, which could never have been, in my judgment, the design of the legislature in the enactment of this provision.

Nor does the limitation of the defendant's route in the city depend upon the consent of the Harlem railroad. The prohibition against running nearer to that road than the Eighth avenue or Hudson street, is merely re-affirmatory of the previous clause in the act prescribing the limitation of the defendant's route.

The complaint avers that the track laid down by the defendant, without authority, interferes with the track of the plaintiffs, and affects their interest, which is sufficient to entitle them to come in to a court of equity and ask for the injunction.

The injunction was properly granted, and the order made at the special term should be affirmed.

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SUPREME COURT.

ORRIN RUSSELL AND HIRAM COUCHMAN, plaintiffs in error agt.
JONATHAN RUSSELL, defendant in error.

To authorize a justice of the peace to issue a summons in *summary proceedings* for the dispossession of lands, the *affidavit* produced to him must show that the conventional relation of *landlord and tenant* exists, and that by an *agreement* between the parties.

Where the affidavit states that "this deponent demised, leased and to farm let, to be worked on shares, for the term of one year," &c., it does not show the relation of landlord and tenant existing, and is entirely insufficient to authorize a justice of the peace to issue a summons in summary proceedings. The parties are *tenants in common*.

Albany General Term, December, 1859.

Before HOGEBOM, HARRIS and WRIGHT, Justices.

THIS is a *certiorari* from the judgment of a justice of the peace in summary proceedings. The defendant in error presented to the justice an affidavit, upon which he issued his summons. The affidavit was as follows :

ALBANY COUNTY, ss. : Jonathan Russell, of the town of Rensselaerville, in said county, being duly sworn says, that on or about the first day of April, 1857, this deponent demised, leased and to farm let, to be worked on shares for the term of one year from the day and date of said demise and leasing as aforesaid, unto Hiram Couchman and Jonathan Russell, the following described premises, that is to say, all that certain piece or parcel of land lying and being in the town of Rensselaerville aforesaid, bounded as follows : Being part of lot No. 102 in Rensselaerville, and bounded on the west by the lands formerly owned and occupied by Noah Russell, deceased, and now occupied by Louisa Russell, widow of Benjamin Russell, deceased ; on the south by lands of Benjamin Palmer ; on the east by the lands of William Goff, and on the north by lands in possession of this deponent, containing seventeen acres of land, be the same more or less ; which said lands at the time of said demise, were owned and occupied by this deponent ; and he was at the time of the aforesaid demise entitled to the possession

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thereof, which said term has expired; and that the said Hiram Couchman and one Orrin Russell, held over and continued in possession of the said premises, without the permission of this deponent.

And this deponent further says, that he caused a notice in writing to be served on the said Hiram Couchman and Orrin Russell, and each of them, in due form of law, on the 25th day of August, A. D., 1858, or thereabouts, requiring them and each of them to remove from said premises within one month from the day of service thereof, which said time has expired; and that the said Hiram Couchman and Orrin Russell, continued in possession of said premises after this expiration of said time, without the permission of the deponent.

JONATHAN RUSSELL.

Sworn before me this 8th }
day of February, 1859, }

WM. R. TANNER, *Justice of Peace.*

On the return of the summons, the attorney for the plaintiffs in error made the following objections: The defendants' counsel now moves to have the justice before whom this cause is pending, set aside the same and to dismiss the said proceedings: First, for the reasons aforesaid, and exceptions taken at the time of the return of the summons in this case: second, for the following reasons and grounds:

1. That the summons issued in this case is not properly directed; that it is not directed to the person or persons by name, except to Orrin Russell and Hiram Couchman, and is directed generally to any other person or persons having or claiming possession.

2. The summons, or oath or affidavit, does not show facts sufficient to give the justice jurisdiction, and does not show the relation of landlord and tenant by conventional relation or otherwise.

3. That the oath or summons, does not show that Orrin Russell is now, or ever was tenant or under-tenant, or assigns, or is characterized as required by statute, to authorize this proceeding against him.

4. The oath or affidavit, should describe him as a person

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against whom these proceedings are authorized as tenant or under-tenant, or in some way to show the relation required by statute to authorize him to be proceeded against in this proceeding.

5. That the summons issued or served in this case, only shows that the applicant made oath and presented the same to the justice, and does not state that the same was in writing, or an affidavit, as it should on the face of the summons kept and served, show a full compliance with the statute in such cases made and provided.

6. That the summons issued does not require the defendants, or either of them, to show cause why possession should not be delivered to said applicant as required by statute, but is that they show cause why possession should not be delivered to the landlord, and is not conformable to statute.

7. That the affidavit in this case does not, in any respect, show the relation of landlord and tenant as to both or either of the defendants, as required by statute to give the justice jurisdiction.

8. That the notice alleged in the affidavit, or the summons issued and served, is not sufficient to terminate any tenancy at will or sufferance, if any existed; that if any service of notice was necessary to serve to terminate tenancy, it should terminate with the year for which the tenancy was to expire.

9. That there is not facts in the oath upon which these proceedings were commenced to give the justice jurisdiction, and, therefore, the justice has not jurisdiction in this case as conferred by statute; and for the above reasons, among others, the defendants' counsel moves to quash the proceedings, or set the same aside, as being wholly unauthorized, and in every respect irregular and void as to one and both defendants.

10. The defendants also move to have Orrin Russell, one of the defendants discharged separately, as well as both defendants.

11. Also, that the summons is not legally served or returned in this case on Orrin Russell, one of defendants,

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and is not duly proved as required by statute on such return as to the service of said summons.

Which objections were overruled by the justice, and the cause was then tried by the justice with a jury, who found a verdict that the applicant was entitled to the possession of the premises in question ; and the justice upon said finding entered judgment that the applicant is entitled to the possession of the premises in question, and judgment for costs in favor of applicant against defendants for \$6.50.

The plaintiffs in error sued out a *certiorari* to this court.

L. & N. W. FALK, *attorneys, and*
NORMAN W. FALK, *counsel for plaintiffs in error.*

I. The said judgment of the justice of the peace should be reversed for the following reasons :

1. The affidavit on which the said proceedings were founded, did not show enough to give the court jurisdiction.

The affidavit, summons and proof, alleged and proved that all the agreement, if any was made, was that Hiram Couchman, one of the defendants, and one Jonathan Russell, agreed *merely to work the land on shares.*

Justice WOODWORTH says in 8 Cowen, 221, that this is not a lease (*Taylor's Land. & Ten.* § 720, p. 454).

"Where the agreement is simply for the cropping or cultivating land on shares, all the cases agree that the parties become tenants in common, and that the relation of landlord and tenant does not exist." (15 Barb. S. C. R. 595, 333 ; 16 How. Pr. R. 454 ; 3 Barb. S. C. R. 397 ; 15 Wend. 228 ; 8 Johns. 151 ; 3 Id. 121 ; 2 Johns. 421 ; 8 Cow. 220 ; 1 Wend. 385 ; 4 Kent's Com. 95 ; *Taylor's Land. & Ten.* 2d. ed. 720 ; 26 Eng. Law and Eq. R. 139 ; 1 Hill's R. 234 ; 7 New Hamp. R. 306, 308 ; 3 Johns. 216 ; 2d ed. Cowen's Tr. 1 vol. 372 ; 3 McCord's R. 211 ; Cro. Eliz. 143.)

2. The affidavit did not show any conventional relation of landlord and tenant by agreement, as to Orrin Russell. This it must do to entitle the party to this remedy. (1 Seld. R. 383 ; 5 Wend. 281 ; 3 Barb. S. C. R. 397 ; 4 Denio, 71 ; 24

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Barb. S. C. R. 438 ; 6 *Hill*, 314 ; *Lal. Sup. to Hill & Den.* 236 ; 24 *Barb. S. C. R.* 438.)

3. To give the court jurisdiction, the preliminary affidavit of the landlord must make out a plain case (6 *Hill*, 314-318). It also must show the tenant's relation to the landlord to be that of landlord and tenant by conventional agreement, and not by operation of law. (5 *Wend. R.* [see note] 281 ; 1 *Seld. R.* 383 ; 5 *How. Pr. R.* 86 ; *Prouty agt. Prouty*, 19 *Wend. R.* 391 ; 23 *Id.* 614 ; 20 *Id.* 207 ; 16 *Barb. S. C. R.* 474, 483 ; 24 *Id.* 438 ; 4 *Denio*, 71 ; 3 *Sandf.* 664.)

It should moreover show how the defendants, and each of them, are in possession ; whether tenants or undertenants (16 *Barb. S. C. R.* 474, 483). It should not be uncertain or contradictory (*Lal. Sup. to Hill & Denio*, 236).

II. There was no allegation in the affidavit of any demise or leasing to Orrin Russell ; no proof of any on trial, or even letting on shares ; no evidence against him, or that he ever recognized plaintiff or his title in any form. (6 *Hill*, 317 ; 16 *Barb. S. C. R.* 483 ; 24 *Id.* 438 ; 4 *Denio*, 71.)

III. The summons was improperly directed ; it should have been directed to a person in possession of the premises, or person claiming possession thereof, by name (2 *R. S.* § 30, *p.* 757, 4th ed). And those only to be named—it is to defendants by name, “or to any other person or persons having or claiming possession.” (6 *Hill*, 316 ; 24 *Barb. S. C. R.* 438.)

1. It was wrong, because it required the defendants “to show cause why possession should not be delivered to the landlord.” The second *R. S.* (§ 30, *p.* 757), uses the word *applicant*.

IV. The summons was not served according to law, nor was it properly returned.

1. To give the justice jurisdiction to proceed (2 *R. S.* 4th ed. *p.* 757, § 32, *sub.* 2, as amended 1857), summons to be served as follows :

“SUB. 1. By delivering to the tenant to whom it shall be directed a true copy thereof, and at the same time showing the original ; or,

SUB. 2. If such tenant be absent from his last or usual

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place of residence, by leaving a copy thereof at such place with some person of mature age, residing *on the premises*, or if there be no such person residing thereon, then such service may be made by affixing such copy upon a conspicuous part of said demised premises."

2. The return should state that Orrin Russell being absent from his last or usual place of residence, that the copy was left with a person of mature age (stating age, &c). It should have stated that Hiram Couchman (with whom the copy for O. Russell was left), resided at the time on the premises. The return was, therefore, defective.

3. Defendants appearing and objecting, no waiver. (4 *Denio*, 71 ; 1 *Seld. R.* 383 ; 5 *Id.* 35 ; 1 *Hill*, 512.)

V. The notice to terminate the tenancy was not in conformity to law. Also, it was not served at the proper time, and the manner of service was not legal.

1. The defendants, if tenants at all, must have been either "tenants at will," "at sufferance," or from year to year, at time notice was served. If tenants at will or at sufferance, they (by statute) were entitled to a thirty days' notice to quit.

2. According to the landlord's affidavit, the contract terminated first of April, 1858. The notice to quit was not served until in August following.

3. The notice of thirty days must be given at the end of the year ; that is, the thirty days must terminate with the year (*Prouty agt. Prouty*, 5 *How.* 87, 89, 92).

4. Tenants from year to year, are included in the term "tenants at will" (5 *How. Pr. R.* 81). "These statutes" being in derogation of the common law rights of tenants, and must be strictly pursued (5 *How.* 93). The notice was not legally served. (2 *R. S.* 4th ed. p. 153, § 8 ; 20 *Wend.* 207, 209 ; 1 *Hill*, 512 ; 7 *East*, 71 ; 1 *Seld. R.* 383 ; 5 *Id.* 35.)

VI. The jury were not drawn in accordance with the statute relating to these proceedings. Twelve were summoned and only eleven appeared, and the jury were drawn from the eleven.

1. This was contrary to the statute. See 2 Revised Stat-

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utes (4th ed. p. 757, § 36), says: "Six of the persons so summoned shall be drawn," &c.

2. The court excused Lucius Dellamater, one of the persons drawn. No excuse shown for the same. This was error. See objection to same by defendants. (2 R. S. 4th ed. p. 758, § 36; 20 Wend. 207, 209; 1 Seld. 383; 5 Seld. 35.)

VII. The testimony shows that about ten acres of the land claimed in affidavit was not leased at all, on shares or otherwise. Yet the plaintiff recovered for the whole, being the seventeen acres.

VIII. The court erred in not allowing the defendants to show a right of possession in defendants, by title or otherwise, under which they were in possession, as set forth in each of defendant's affidavits. (See 3 Barb. S. C. R. 400.) WILLARD J., says, "that the right of possession was put in issue by plaintiff and defendant's affidavit." (1 Hill, 121; 2 Id. 554; 3 Id. 182; 6 Id. 317; Crary on Special Pro. 467.)

1. The title in this case was in issue by plaintiff's affidavit as well as the affidavits of defendants.

2. The plaintiff claimed to be entitled to the possession as owner. And defendants in their affidavit set up title and ownership acquired prior to any letting, which entitles defendants to controvert that fact in issue. (2 R. S. § 34, p. 757, 4th ed.; 3 B. R. 402; Tay. Land. & Ten. 2d ed. 509, § 723; 11 W. R. 916; Crary's N. Y. Pr. on Special Pro. 467; 3 Sandf. 664; 6 Wend. 666; 5 Seld. R. 47; 16 N. Y. R. 573; 15 Id. 377; 22 W. R. 121; 1 Sandf. 517.)

IX. The court erred in not dismissing the proceedings on grounds set forth on page 28 of case, and in not charging the jury as requested by defendants' attorney, and in charging as he did; to which defendants' attorney excepted.

The court cannot reverse as to one, but only as to all the defendants. If irregular as to one, it is irregular as to all. (Crary's Spe. Pro. 475; 5 Seld. 227; Lal. Sup. to Hill & Denio, 236.)

All the points raised for the reversal in this case, were specifically made in the court below and overruled.

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For the above reasons, the defendants ask the court to reverse the judgment of the justice of the peace, with costs.

VALENTINE FERRO, *attorney, and*
L. D. HOLSTEIN, *counsel for defendant in error.*

By the court, HOGEBOM, J. The affidavit made by the defendant in error, was clearly insufficient to give the justice jurisdiction. The facts stated therein, simply show "a cropping or cultivating of land on shares," and by numerous authorities, and a series of well adjudicated decisions, the parties in such cases are *tenants in common*. (15 Barb. S. C. R. 595, 338; 16 How. Pr. R. 454; 3 Barb. S. C. R. 397; 15 Wend. 228; 8 Johns. 151; 3 Id. 121; 2 Id. 421; 8 Cowen, 220; 1 Wend. 385; 4 Kent's Com. 95; Taylor's Land. & Ten. 720; 26 Eng. Law & Eq. R. 139; 1 Hill, 234; 7 N. H. R. 306-8; Cro. Eliz. 143.)

And it is equally well settled that in such cases no realtion of *landlord and tenant* exists. (See *authorities before cited*.) The affidavit must show the conventional relation of landlord and tenant, and that by an agreement, before the applicant is entitled to this remedy. (1 Seld. R. 383; 5 Wend. 281; 3 Barb. S. C. R. 397; 4 Denio, 71; 24 Barb. S. C. R. 438; 1 Hill, 314; Lal. Sup. to Hill & Denio, 236.) And the affidavit must show the tenant's relation to the landlord to be that of landlord and tenant by conventional agreement, and not by mere operation of law.

The affidavit showing no such relation of landlord and tenant, the justice clearly erred in issuing his summons, as well in not discharging the proceedings on motion of the plaintiffs in error, for the reasons I have given.

The judgment and proceedings before the justice should be reversed.

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SUPREME COURT.

J. FRANKLIN PECK agt. THEODORE D. YORKS.

While an *injunction* remains, it must be obeyed, and it is no answer to a charge of violation, that the injunction ought not to have been granted, or that it restrained acts which were proper in themselves, and which were improvidently restrained.

Where an injunction order improperly restrains certain acts of the defendant, and during its continuance these acts are performed by the defendant in technical violation of the injunction, but subsequently the injunction is modified so as to dispense with the clause improperly restraining such acts, an *attachment* for such violation of the injunction, applied for and issued after the modification of the injunction cannot be sustained.

This is upon the general principle that an injunction, which is but an order of the court, can have no more force or extended operation after it is set aside or modified, than a statute repealed or modified, in regard to acts previously done.

Monroe Special Term, February, 1867.

Before THOMAS A. JOHNSON, Justice.

ATTACHMENT for an alleged violation of an injunction. The plaintiff was a judgment creditor of Anthony Yorks, and brought his action in the nature of a creditor's suit against him and the above named defendant, and another.

The defendant was charged generally in the complaint with having in his possession and under his control, a large amount of property, securities and money, belonging to the judgment debtor.

The injunction enjoined and restrained the defendant from interfering, meddling with, or disposing of any of said property, &c., and in addition thereto any property in his possession or under his control.

On the 27th of January, 1864, the injunction was modified so as to restrain the defendant only, from disposing, &c., of such property as he had received from the judgment debtor, or such as belonged to such judgment debtor prior to November 22, 1861, and the proceeds thereof.

Prior to this modification, and while the injunction as originally granted remained in force, the defendant sold and conveyed a certain piece or parcel of land, and also assigned a certain bond and mortgage for upwards of \$6,000, which had

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been assigned to him by a person other than the judgment debtor. This property belonged to the defendant in his own right, and had never in any manner, belonged to the judgment debtor, as the referee finds, to whom it was referred to take the proofs in the proceedings on the attachment, and report the same to the court, with his opinion thereon.

The attachment was granted upon an *ex parte* application by the plaintiff, on the 29th of April, 1864, three months after the modification of the injunction.

J. F. PECK, *in person*.

G. F. DANFORTH, *for defendant*.

JOHNSON, J. The injunction as originally granted, by its terms restrained the defendant from disposing of any property in his possession or under his control, whether it was or ever had been the property of the judgment debtor or not, and had there been no modification of such injunction, I should be inclined to the opinion that there had been a technical violation of it by the defendant. Unquestionably the injunction was improvidently granted with so wide a scope, and was very properly modified, so as to operate only on property to which the plaintiff could possibly lay claim. But this is of no consequence, on the question of the violation of its provisions. While the injunction remains it must be obeyed, and it is no answer to a charge of violation, that the injunction ought not to have been granted.

But here the defendant is not proceeded against until after the modification, and the question arises, whether the modification did not operate to divest entirely of their illegal and improper character, the acts complained of. I am clearly of the opinion that it did. The only case I have been able to find where this question seems to have been raised, is that of *Moat agt. Holbein* (2 Ed. Ch. R. 188), in which the vice chancellor expresses the opinion that no motion made for an attachment after the dissolution of an injunction, on the ground of an infringement of it while in force, can be sustained. It does not appear, however, that the decision was

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put exclusively upon that ground. But the analogies are all that way.

It is well settled, both in England and in this country, by numerous adjudications, that where an act is forbidden and rendered criminal by statute, and which statute is afterwards repealed, offences committed under it before such repeal, and the proceedings thereupon, are discharged by the repeal, and cannot be proceeded on afterwards unless there is a special clause in the repealing act authorizing proceedings for such acts.

In the case of *Hartung agt. The People* (22 N. Y. R. 95), it was held that the repeal of a law imposing a penalty, arrests the judgment even after conviction for the offence, and the judgment must be reversed on writ of error.

The authorities on the question are nearly all cited in that case. The rule has been repeatedly recognized and acted upon by the courts of this state upon the repeal or modification of our excise laws, in regard to offences committed before such repeal or modification. The reason of this rule applies with full force to the case of an injunction vacated or modified, and all acts in violation of it previously. An injunction, which is but an order of the court, can have no more force or extended operation, after it is set aside or modified, than a statute repealed or modified, in regard to acts previously done. In either case, the rule being abolished, the infraction of it is abolished also, and nothing remains on which a conviction can be based.

There was no saving clause in the order modifying the injunction in question. The illegal acts became legal and innocent by relation, upon the modification of the injunction, upon the same principle, substantially, that a legal act done under voidable process, becomes illegal and actionable by relation, after the process is set aside. While the process stands, an act in pursuance of it may be justified under it, but the moment it is set aside, an action lies by the injured party, and the process being set aside, no justification remains to the party in whose favor it is issued and served (*Chapman agt. Dyett*, 11 Wend. 31).

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It is claimed by the plaintiff, that upon the testimony before the referee, it appears that a portion at least of the property thus disposed of by the defendant, came originally from the judgment debtor. But the referee finds the other way, and in this he is sustained by the preponderance of the evidence.

I must hold, therefore, that the defendant has not been guilty of the misconduct alleged, and that he is entitled to his discharge from the attachment, with such costs as are allowed by law.

COURT OF APPEALS.

THE PEOPLE agt. FRANK FERRIS.

The general term of the supreme court has the power to fix a day for the execution of a prisoner, although he has been tried, convicted and sentenced in the court of general sessions, upon the affirmance of that judgment on appeal.

The act of April, 18th, 1859, which says, upon the affirmance of a judgment in a capital case, it shall remit the record to the court from which it came, is not applicable to a case where the record is removed from the supreme court to the court of appeals.

Upon the affirmance of a judgment in the court of appeals, and the record is remitted to the supreme court, it is the duty of that court to follow the directions of the appellate court.

September Term, 1866.

On the 25th of September, 1866, application was made to the Hon. J. K. PORTER, one of the judges of the court of appeals, for a writ of error in behalf of Frank Ferris, on the ground that the supreme court, general term, had no power to sentence the prisoner to death. The judge granted a rule to show cause, returnable on the 28th inst., before the court of appeals at Albany.

WILLIAM F. KINTZING, JR., *for the motion, argued,*

Upon the conviction of Francis Ferris, otherwise called Frank Ferris, the court of general sessions pronounced the following judgment against him, viz :

“Whereupon all and singular the premises being seen,

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and by the said justice fully understood, it is considered by the said justice that the said Francis Ferris, otherwise called Frank Ferris, for the murder and felony aforesaid, whereof he stands convicted, be taken hence to the city prison of the city of New York, from whence he came, and on Friday, the 14th day of April next ensuing, be hanged by the neck until he is dead."

This judgment was approved by the supreme court and court of appeals, and was and is now a lawful and binding judgment, and the only one that can be legally enforced; and instead of remitting the record to the court of general sessions, for that court to fix a day for the execution of the original sentence (that above recited), as the statute requires the supreme court to do, that court did, as appears from the record of its proceedings, and by the warrant issued from the court to the sheriff, for the execution of the convict, itself pronounce a new, complete and an independent sentence and judgment against the prisoner, and did fix and appoint the 17th day of August for the execution of that sentence. The following is a copy of the sentence by the court, and of the order fixing the day upon which to carry it into effect:

"It is therefore considered, ordered and adjudged by the said court, that the said Francis Ferris, otherwise called Frank Ferris, for the murder in the first degree and felony aforesaid, whereof he stands convicted as aforesaid, be taken hence to the city prison of the city of New York, from whence he came, and on Friday, the 17th day of August next, be hanged by the neck until he is dead.

"Now, therefore, you the said sheriff are required, and by these presents strictly commanded, to cause execution to be done upon the said Frank Ferris according to law. And the said court hath appointed, and doth hereby appoint Friday, the 17th day of August next, the day upon which the said sentence shall be executed."

In witness whereof, &c.

(Signed)

GEO. G. BARNARD,
THOS. W. CLEBKE,
JOSIAH SUTHERLAND.

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Here is a second sole and distinct judgment, denouncing the same penalty upon the same person, from the same verdict as that by the court of general sessions. Now I aver that there is not, and never has been, any statute law authorizing the supreme court in affirming a judgment upon a writ of error, to pronounce a new sentence in a case like this, and that it was never before done. If this case had gone from the sessions to the supreme court upon a bill of exceptions by certiorari, without any judgment in the trial court, this would be a proper sentence, fully authorized by an express statute (3 *R. S.* 5th ed. p. 1034, § 27). But when there is a judgment declared in the court below, and the record, with that judgment, is taken by writ of error to the supreme court, and all the proceedings approved, any second or other judgment by the appellate court is without authority, and clearly erroneous. The following statute provides fully and plainly what shall be done by the supreme court in a case like the present:

“Whenever, after conviction upon any indictment, the record thereof shall be removed from any other court into the supreme court, for the purpose of review, the supreme court shall, upon affirming or reversing the judgment or other proceedings, remit the record to the court from which the same was removed, and the court to which the same shall be remitted, shall have the power to proceed thereon according to the decision and direction of the supreme court” (*Laws of 1859, chap. 462, § 2*).

Previous to the passage of this act the Revised Statutes contained the following provision upon the same subject, and it is plain that neither under that nor this, was or is there any authority given the supreme court to pronounce a new judgment upon a convict. The difference between the old and new statutes being, that under the old the supreme court fixed the day for the execution of the original judgment—pronouncing no other; and under the new, that court is required to send the record to the court from which it came, that that court may appoint the time for the infliction of the penalty.

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The prior statute was as follows :

“ If the supreme court shall affirm such judgment, it shall direct the sentence pronounced to be executed, and the same shall be duly executed accordingly,” &c (3 *R. S.* p. 1035, § 26).

It is submitted, with great deference and respect, that the supreme court, both in passing this sentence and also in fixing the day for the execution of the prisoner upon any sentence (as will be shown under the next objection), has exceeded its power, and, therefore, confers no authority on the sheriff to hang the convict by virtue of his present warrant. If the 17th of August is named for the execution of the judgment pronounced by the supreme court, and that judgment is void, then no day has been lawfully fixed upon which the prisoner can be legally hanged, as none has been appointed for the enforcement of the first and only lawful judgment that has or can be pronounced in the case.

My second objection is, as before stated, that the supreme court had no authority to fix a day for the execution of any judgment against this prisoner—the sole power to do that being in the court in which he was tried, convicted and originally sentenced.

Formerly the Revised Statutes provided, as before stated, that “ if the supreme court shall affirm the judgment, it shall direct the sentence pronounced to be executed, and the same shall be executed accordingly.” This law was strictly observed by the supreme court, in all cases where, by reason of an appeal, the day fixed for execution by the trial court was passed, until that statute was substituted by the act of 1859, above recited. This act, as is seen by referring to it, provides that “ whenever after conviction upon any indictment, the record thereof shall be returned into the supreme court for the purpose of revision, the supreme court shall, upon affirming or reversing the judgment or other proceedings, remit the record to the court from which the same was removed, and the court to which the same shall be so remitted, shall have power to proceed thereon, according to the decision and direction of the supreme court.” Ever since the passage of this law, the supreme court has ceased to fix

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the day for enforcing the judgment of the court in which the appellant was tried, but in every case throughout the state, so far as I can learn (the case of *Willis*, 32 N. Y. forms no exception), the supreme court has, on affirming the judgment, remitted the record to the court from which it came, that the court might appoint another day for the infliction of the penalty

This act of 1859, embraces the entire subject comprised by the Revised Statutes, and is in conflict with it, and thus by implication repeals the statute as completely as if the act contained a clear repealing clause. See authorities : (*Broom's Leg. Max.* 2d ed. p. 23 ; *Com. agt. Cramby*, 1 *Ashmead*, 179 ; *Dugan agt. Gittings*, 3 *Gall.* 138 ; *Button agt. Com.* 1 *Cushing*, 502 ; *State agt. Miskimmons*, 2 *Coit [Indiana]*, 440 ; *Com. agt. Canby*, 10 *Pick.* 37 ; *Towle agt. Merrit*, 3 *Greenleaf*, 22 ; *Goodman agt. Buttrick*, 7 *Mass.* 140 ; *Bartlett agt. King*, 12 *Mass.* 537-545 ; *State agt. Wentworth*, 8 *Porter*, 434 ; *Smith agt. State*, 1 *Steward*, 506 ; *Case of Ashby*, 4 *Pick.* 21-23 ; *Mason agt. Waite*, 1 *Id.* 452. *Ellis agt. Page*, *Id.* 43-45 ; *Jennings agt. Com.* 19 *Id.* 168 ; *Lighton agt. Walker*, 9 *N. H.* 59 ; *Bryan agt. Lundberger*, 5 *Texas*, 418 ; *Caldwell agt. St. Louis Ins. Co.* 1 *Low*, 85.)

Two statutes relating to the same subject may exist together, provided they are not repugnant. But where, as in this case, a particular power and duty is expressly conferred and devolved upon one court by an express provision of law (as upon the supreme court by the Revised Statutes), and afterward, that court is by an equally expressive statute commanded (shall remit, &c.) to remit the record (the subject for an exercise of that power and duty) to a second court, and that second court is required to exercise the power and duty before conferred and devolved upon the first (as by the act of 1859) ; when that is the case, as it is in this instance, the two statutes cannot equally exist at the same time, and be equally operative on the same subject. This statute of 1859, is in effect, that the court shall not exercise the power and perform the duty of naming the day for the execution ; for it declares that that court shall remit the case to the trial

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court for that purpose. It is a mandatory act, fully as much as the first statute, and not directory in any sense.

The question here presented, is not so much on what day the prisoner shall be executed (so to speak), but what court has authority to appoint that day? It is strictly a question of power—a question that always underlies all others, and in this instance involves human life. That the court of sessions, by which the first judgment was pronounced, has the right to fix the day under the law of 1859, there is not, and cannot be, any doubt; and it seems equally certain that not only the letter, but the spirit and purpose of the provision that confers the power and devolves the duty upon that court, concludes against its being longer performed by the supreme court. Indeed, if the latter court obeys this statute, and after affirming a judgment of the court below, remits the record, it is impossible that it can fix the day, while the lower court *must*. For what purpose, other than this, was the statute of 1859 passed? It does not purport to enlarge or restrict, qualify, revise or amend, the prior law; but is a sole, distinct and independent statute; being the last expressed will of the law-making power upon the subject, and as such must prevail over any previous law to the contrary. The order of the court of appeals contained in the remittitur, bringing the case from that court back to the supreme court, was that the supreme court proceed in the matter according to law, and nothing more; which means, and was intended to mean, according to the law of 1859. Of this there can be no doubt.

Finally.—Conceding all that can by possibility be fairly claimed or said on the part of an adverse view of this case, and I submit with confidence, that there is still sufficient doubt of the legality of these proceedings by the supreme court to make it eminently just and proper, in a case involving the life of a citizen, that a writ of error should issue, with a stay of execution of judgment, until the court of appeals shall consider the objections herein supposed.

In aid of this application for a writ of error, with a stay of proceedings, &c., I invoke the following statute, passed in

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1855. This is a statute promotive of both legal and substantial justice, and although this case has passed from the court of sessions to the supreme court and court of appeals, under its provisions it is still applicable as ever before, if, as is here made clearly apparent, great error hath intervened, in the late and final proceeding in the supreme court, involving grave questions of law, and serious faults of practice, deeply prejudicial to the prisoner's interest, and in violation of his just rights.

"Every conviction for a capital offence, or for one punishable as a minimum punishment by imprisonment for life, shall be brought before the supreme court and court of appeals, from the said court of general sessions of the peace, in and for the city and county of New York, upon a writ of error, with a stay of proceedings, as a matter of right," &c (3 *R. S.* 5th ed. p. 311, § 63).

GUNNING S. BEDFORD, JR., *opposed.*

DAVIES, C. J. The facts appearing upon this application are as follows: The prisoner was indicted, tried and convicted, in the court of general sessions of the peace, in and for the city and county of New York, on the 28th day of February, 1865, of the crime of murder in the first degree, and sentenced to be executed on the 14th day of April following. On the day of his conviction and sentence, the case was removed by a writ of error to the supreme court for review, and on the 22d day of December, 1865, the judgment of the sessions was affirmed by that court. The case was taken by a writ of error to this court, and in the month of June last, the judgment of the supreme court was affirmed, and the record remitted to the supreme court, to proceed thereon according to law.

On the 22d day of June last, after the said record had been remitted from this court, the supreme court proceeded therein, in the manner following: On that day the prisoner was brought into said court, before the general term thereof, by virtue of a writ of *habeas corpus* issued therefrom; and

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the said court did thereupon, "consider, order and adjudge, that the prisoner, for the murder in the first degree, and the felony aforesaid, whereof he stands convicted, be taken to the city prison of the city of New York, from whence he came, and on Friday, the 17th of August next, be hanged by the neck until he is dead."

This sentence is identical with, and but a repetition of that pronounced by the court of general sessions, except in the day fixed for its execution. And the said court did thereupon issue its warrant to the sheriff of the city and county of New York, to cause execution to be done upon the said Frank Ferris, according to law. And the said court did thereupon appoint the 17th day of August, then next as the day upon which the said sentence should be executed.

The governor, on the application of the prisoner, respited the execution of the sentence until the 19th of October, 1866.

It is now urged on behalf of the prisoner—

1. That the supreme court had no authority to pronounce judgment of death upon this prisoner; the judgment of the court of general sessions being still valid, operative and now affirmed, and the only one upon which the prisoner can be hanged.

2. That the supreme court had no authority to fix a day for the execution of the prisoner; the sole power to do that being in the court in which he was tried, convicted and originally sentenced.

We think it may be conceded, that as to the first branch of the first position of the prisoner's counsel, namely: that the supreme court had no authority to pronounce judgment of death upon the prisoner, it is sound.

A judgment of death had been pronounced by a competent court, and remained in full force; and we entirely concur with prisoner's counsel in the second branch of his first proposition, to wit: that the judgment of the court of general sessions being still a valid, operative and affirmed judgment, was the only one upon which the prisoner could be executed. It was, therefore, a work of supererogation in the supreme

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court to pass sentence again upon the prisoner. The sentence already passed was in accordance with the law, was valid, operative and unreversed, and had been affirmed by the court of last resort. There was no occasion, therefore, for another sentence, and this act of the supreme court, although uncalled for, worked no detriment or injury to the prisoner, and is no ground for a reversal of the original judgment or sentence ; that remains in full force, valid and operative. What then remained for the supreme court to do, to comply with the directions of this court, to proceed according to law on the record being remitted from this court to that—that duty is clearly pointed out in the statutes of this state (3 R. S. §§ 23, 24, p. 937).

Section 23 enacts that, “ whenever, for any reason, any convict sentenced to the punishment of death, shall not have been executed pursuant to such sentence, and the same shall stand in full force, the supreme court, on the application of the attorney general, or of the district attorney of the county where the conviction was had, shall issue a writ of *habeas corpus*, to bring such convict before such court ; or if he be at large, a warrant for his apprehension may be issued by the same court, or any justice thereof.”

Section 24 enacts that, “ upon such convict being brought before the court, they shall proceed to inquire into the facts and circumstances, and if no legal reason exist against the execution of such sentence, they shall sign a warrant to the sheriff of the proper county, commanding him to do execution of such sentence, at such time as shall be appointed therein, which shall be obeyed by such sheriff accordingly.”

All these provisions have been literally complied with in the present instance, and the only departure from them is one of form and not of substance ; that is the re-pronouncing by the supreme court, the same sentence and judgment which had already been pronounced by the court of general sessions, and which had been affirmed by the supreme court and by this court. The duty of the supreme court, and its whole duty was, on being informed that the sentence had

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not been executed, to cause the convict to be brought before that tribunal.

That was done here ; upon his appearance there the court was to inquire into the facts and circumstances, and if it should find that no legal reasons existed why the sentence should not be executed, then it was made the duty of the court to issue a warrant to the sheriff of the county in which the conviction was had, commanding him to do execution of such sentence at such time as the court should appoint. All this had been done in strict fulfillment of these directions, and we do not see any reason for doubting their regularity. The circumstance that the supreme court repeated the sentence already in force and operative, does not, in our opinion, vitiate or impair what was done, or make it less effectual. The court with the exception of this unessential particular, has proceeded pursuant to the directions of this court according to law.

These considerations dispose of the second position taken by the prisoner's counsel, namely : that the supreme court had no authority to fix a day for the execution of any judgment against the prisoner. We have seen that the language of the Revised Statutes, already quoted, fully authorized the supreme court to name a day for the execution of the sentence then in full force.

The argument of the prisoner's counsel is based upon the second section of the act of April 18, 1859 (*Laws of 1859, chap. 462*). It is in these words : " Whenever, after the conviction upon any indictment, the record thereof shall be removed from any other court into the supreme court, for the purpose of review, the supreme court shall, upon affirming or reversing the judgment or other proceedings, remit the record to the court from which the same was removed ; and the court to which the same shall be so remitted, shall have power to proceed therein according to the decision and directions of the supreme court."

The Revised Statutes have provided for the action of the supreme court upon writs of error and certiorari in criminal cases. Section 24, 2 Revised Statutes, 741, declared : " If the

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supreme court shall affirm such judgment, it shall direct the sentence pronounced to be executed, and the same shall be executed accordingly. If the supreme court shall reverse the judgment rendered, it shall either direct a new trial, or that the defendant be absolutely discharged, according to the circumstances of the case."

This section was amended by the act of April 24th, 1863 (*Laws of 1863, chap. 226*), by adding thereto the following proviso: "Provided, however, that the appellate court shall have power upon any writ of error, when it shall appear that the conviction has been legal and regular, to remit the record to the court in which such conviction was had, to pass sentence therein, as the said appellate court shall direct."

We had occasion in the case of *Ratzky agt. The People* (29 N. Y. 124), to pass upon this section as amended. In that case we were of the opinion that the conviction of the prisoner had been legal and regular in the Kings county oyer and terminer, but that the sentence pronounced upon such conviction was unwarranted in law, and we therefore reversed the judgment of the supreme court affirming the same, and directed the record to be remitted to the court of oyer and terminer to pass the sentence prescribed by this court.

We think it would have been competent for this court to have fixed the day for the execution of the sentence which this court by its judgment affirmed. Such certainly was the practice in the court for the correction of errors, and there is no reason which can be suggested, why this court could not do what it was competent for that court, unless restrained by statute.

In the case of *The People agt. Enoch* (13 Wend. 159), the chancellor in delivering the opinion of the court said, on affirmance of a judgment of the supreme court in a capital case: "I am also of opinion that in a case like the present, where the execution of the sentence is respited by the governor until a particular day, it is the duty of the sheriff to proceed and execute the judgment of the court at that time,

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unless a further respite is granted, or the judgment has been reversed or amended in the meantime."

I am also of opinion that this is not a case in which it is necessary to sue out a writ of *habeas corpus*, and to have the convict brought into the supreme court, before the sentence of the law can be executed upon him. The judgment of affirmance may contain a special direction to the sheriff to execute the sentence on the day to which the execution thereof was last respited by the governor.

In the case of *The People agt. Clark* (3 *Seld.* 385), this court on reversing a judgment of the supreme court, and affirming the judgment of the oyer and terminer in a capital case, where the latter court had sentenced the prisoner to be executed—ordered, that as the day fixed for the execution had passed, the proceedings must be remitted to the supreme court to pronounce sentence against the prisoner. The order actually made in this court was, that the record be remitted to the supreme court, in order that that court may direct the sentence of death to be executed, and that court did accordingly proceed to have that sentence executed. (*See The People agt. Clark*, 1 *Parker's C. R. Rep.* 360.)

We think the provisions of the second section of the act of 1859, are inapplicable to a case like the present, where the record is immediately removed out of the supreme court into this court, upon the announcement of the judgment of the court. If the record had remained in that court, it would doubtless have been regular for the supreme court to have remitted the record to the court of general sessions, with directions to that court to fix a day for the execution of the sentence affirmed, and to issue the proper warrant therefor. But the record in this case having been removed to this court, it was not in the power of the supreme court to remit it to the general sessions, and the statute did not make it obligatory upon that court to remit the same to the general sessions, upon its return there with the judgment and directions of this court.

The general provisions of the Revised Statutes, could, therefore, properly be invoked, which are made applicable to

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every case of a convict sentenced to the punishment of death, whenever, for any reason, such sentence shall not have been executed, and the same shall stand in full force.

The affirmance of the judgment and sentence pronounced in this case by this court was final, and, therefore, it stood in full force; but the day fixed for the execution having passed, further action became necessary, and that was taken in this case, in strict conformity with the letter of the statute. The action of the supreme court, was, therefore, in accordance with the directions of the statute, except in the unimportant particular already adverted to, and the motion for a writ of error is denied.

All concur.

SUPREME COURT.

SARAH W. MIDGELEY agt. THOMAS SLOCOMB and another.

Where an *assignment for the benefit of creditors*, provides that the trust is "to apply the proceeds towards the payment of the persons or corporations, holders now or at any future time, for the time being," of a specified class of notes of the assignors, the meaning is that the assignees shall pay debts outstanding at the time of the execution of the trust; and not that they should make a *distribution* on the basis of the original indebtedness.

Consequently, where a bank, a creditor holding notes belonging to the class mentioned in the assignment, to a large amount, which were secured in part by a pledge of notes of other parties, which latter notes had been collected by the bank: *held*, that the law applied these collections to the payment of the principal debt, so that the bank had ceased to be the holder of the notes thus paid, and was not entitled to a dividend on the basis of the original indebtedness.

Kings Special Term, February, 1867.

Before JASPER W. GILBERT, Justice.

THIS action was brought by the plaintiff as a creditor of the firm of Wilson, Midgeley & Jennings, to compel the defendants to account, as assignees of the firm.

The action was referred to Judge Greenwood, to take the account, adjust the claims of the respective creditors, and report.

Upon the hearing before him, it appeared that the Park

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National Bank held an indebtedness against the assignors at the time of the assignment of \$23,500, for money borrowed, which had been reduced by collections from notes held as collateral at the time of the assignment to \$9,573.25. The bank claimed the right to exhaust the collaterals, and that the dividend under the assignment must be on the amount due at the date thereof, \$23,500, and not on the balance due them at the time of the dividend, \$9,573.25; they having the right to two funds.

The referee decided against the claim of the bank, and ordered a dividend on the amount due at time of distribution, and also ordered a sale of the collaterals.

A motion was made to confirm the referee's report.

BARLOW & HYATT, *for the National Park Bank, opposed,*

Citing Miller's Case on Appeal (11 Casey, 35 Penn.), and other similar cases from the English Reports.

MESSRS. WINSLOW, *for plaintiff.*

PLATT, GERARD & BUCKLEY, *for defendants.*

T. CRONIN, *for Smythe, Sprague & Cooper, in support of referee's report.*

I. The doctrine of application of payments, has full force between the assignors and the Park Bank.

The assignors were borrowers of the bank, and secured them by depositing collaterals. As they were collected, they must apply in reduction of the assignor's debt. This principle has application to the relation of the assignors to the bank in every aspect, and in all its legal bearings. (*See Stone agt. Seymour, 15 Wend. 19; Seymour agt. Van Slyck, 8 Id. 403; 19 Id. 19.*)

II. The court will direct the payments received from the collaterals to be applied for the benefit of all the creditors interested in the assigned fund, as well as for the benefit of the debtors (*Baker agt. Stackpole, 9 Cow. 420*).

III. In this case the creditor has actually made his elect-

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ion, and applied the payments received from the collaterals to the reduction of the original debt. Having made an election, they are bound by it, and cannot now say that the assignors still owe them the original debt. (*See Allen agt. Culver*, 3 *Denio*, 284.)

IV. In this case the assignors made an application by the terms of the trust contained in the *assignment*, and provided that the Park Bank should be paid *pro rata* upon the notes of which they were holders ; *i. e.*, notes *unpaid*, and *existing liabilities* against the assignors, at the time of a dividend from the assigned assets.

The recital in the assignment is, "appropriating their real and personal property of every kind and description, towards the payment of their debts and obligations, in the order of preference and priority hereinafter declared, and for the purpose of securing to their creditors a *just division* of the property of said parties of the first part." Thus providing against any inequitable rule of marshaling assets, or applying money derived from collaterals, or receiving dividends without deducting payments derived from collaterals.

V. The trust in the assignment further provides for the payment of the debts mentioned in schedule B, including the debts due Park Bank, as a secured provision "towards the payment of the persons or corporation holders, now, or at any future time, for the time being, of all notes or other obligations of the parties of the first part." Thus limiting the assigned fund to a *pro rata* distribution from it to the holders of notes unpaid, at the time of the distribution of the assigned assets.

The Park Bank cannot now be the holder of notes paid in part by the assignors from collaterals.

These notes have been paid, and are not now held in the legal sense of the term, and could not be recovered against the assignors. They have been paid in part, and the dividend can only be on the balance due at the time of declaring it by the referee.

The Park Bank could not now recover of the assignors the amount of those notes already paid from moneys rea-

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lized from the collaterals. They are not held by them in law; they are only physically in possession of the bank.

Hence they can only receive a dividend upon the amount now due, after deducting payments received through collaterals.

As to who is deemed a lawful holder of notes: (*See Story on Promissory Notes*, § 115, p. 122.)

When a note is received as collateral security for a pre-existing debt, and subsequently paid, the person receiving payment ceases to be a *bona fide* holder of the note. (*See Story on Promissory Notes, and cases cited*, § 195, p. 222.)

VI. If the court can by the application of reasonable and fair rules of construction to the terms of the trust in the assignment, prevent the Park Bank from receiving an unequal share of the funds in the hands of the assignees, they will be bound to do so, and require them to abide by the directions of the assignors to pay *pro rata*, and declare the payments from collaterals to be *pro tanto* a reduction of their debt. (*Story on Promissory Notes*, § 411, and cases cited.)

GILBERT, J. I take it to be clear law as well as equity, that when a debtor makes a general assignment of his property, upon trust, to pay his debts, and therein prefers a creditor to whom he had before the assignment given security for the payment of the debt due him, such creditor is entitled to the benefit of the collateral security, as well as his interest as a *cestui que trust*, until such debt shall have been fully paid. If the collateral security be sufficient to pay the debt, equity, in order to protect creditors who have no lien on it, will compel the creditor holding the collateral security to resort to that in the first instance, and even if it be insufficient. The same proceeding may be decreed when it will not trench upon the rights, or operate to the prejudice of the creditor entitled to the double fund. (*Story's Eq. Jur.* § 638; *Adams' Eq.* 272; *Strong agt. Skinner*, 4 *Barb.* 559; *Besley agt. Lawrence*, 11 *Paige*, 581.)

But as was said by Lord COTTENHAM, in *Mason agt. Bogg* (2 *My. & Cr.* 448), a creditor who thus has a double secu-

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city, has a right to proceed against both, and to make the most he can of both. If a dividend under the assignment so reduces the debt that the collateral security will more than pay it, the only remedy of the assignors, or of the other beneficiaries, is to redeem. (*Story's Eq. Jur.* § 564-6; *Lewin on Trust*, 485; *Brinkerhoff* agt. *Marvin*, 5 *J. Ch. R.* 320; *Hays* agt. *Ward*, 4 *Id.* 132; *Woolcock* agt. *Hart*, 1 *Paige*, 185; *Aldrich* agt. *Cooper*, 8 *Ves.* 382, and notes in *Lea. Ca. in Eq.* 3 *Am. ed.* 276, *et seq.*). The Park Bank, therefore, has a right to receive its share of the proceeds of the assigned property, and to retain and enforce the collateral securities which it holds until the debt due it shall have been paid. The question is, what is its share of the fund now in the hands of the assignees? This depends on the interpretation of the instrument itself, and cannot be determined upon any notion of equity or equality, for the court has no power to create or order a new trust.

The trust is "to apply the proceeds towards the payment of the persons or corporations, *holders now* or at any future time, for the time being," of a specified class of notes of the assignors. At the date of the assignment the bank held notes belonging to this class, amounting to \$23,500, which were secured by a pledge of notes of other parties. The bank has since collected \$16,330.98, on account of these collaterals, leaving due \$9,573.25. The law applied these collections to the payment of the principal debt, so that the bank has ceased to be the holder of the notes thus paid. I think the meaning of the assignment is, that the assignees shall pay debts outstanding at the time of the execution of the trust, and not, as was contended by the counsel for the bank, that they shall make a distribution on the basis of the original indebtedness.

The referee's report on this point is confirmed. But the referee erred in relation to the proposed sale of the collaterals still held by the bank. There may be a decree for the sale of the interest of the assignors in them. But the court cannot interfere with the right of the bank to collect them.

A decree will be prepared and settled.

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NEW YORK SUPERIOR COURT.

ERNST METTLESTADT, by his guardian LEOPOLD METTLESTADT,
appellant agt. THE NINTH AVENUE RAILROAD COMPANY,
respondents.

It cannot be stated as a general rule, that a passenger who leaves a railroad car while in motion, and is thereby injured, is guilty of negligence *as a matter of law*.

Where a boy about fourteen years of age, was riding upon the top of a city railroad car, as a passenger—the car being full inside—having paid his fare, and on arriving at the corner of a certain street, requested the driver to stop as he wished to get off, but the driver did not stop, and on going about half the block at a moderate speed, the boy undertook to get off the car, and in doing so the driver caught him by his head—pulled off his cap and struck at him with his whip, and in attempting to avoid the blow from the whip the boy fell under the car and had one foot run over and severely injured :

Held, that these facts appearing in evidence on the trial, the case should have been submitted to the jury. A judgment of dismissal of the complaint, on the ground that the getting off the car while in motion, was negligence on the part of the plaintiff, reversed, and a new trial ordered, with costs to abide the event.

Heard at General Term in May, 1866. Decided in February, 1867.

Before ROBERTSON, C. J., MONELL and GARVIN, Justices.

THE plaintiff and his companion, a boy about the same age, on the 7th day of September, 1865, got on to one of the defendants one-horse cars at Lispenard street, for the purpose of being taken to Forty-third street, and paid their fare.

Just before they arrived at Forty-third street the plaintiff requested the conductor and driver to stop the car, and let him off at Forty-third street. The conductor did not stop the car at Forty-third street, as requested. The plaintiff's companion got off at Forty-third street safely, while the car was in motion.

The plaintiff having been carried beyond Forty-third street, attempted, when about the middle of the block between Forty-third and Forty-fourth streets, to get off the car, the driver still persisting in his refusal to stop and let him off.

As the plaintiff started to get off, the conductor took off the plaintiff's cap ; and as he reached up one hand to get

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his cap, the driver struck him with his whip. The plaintiff in attempting to avoid the blow fell, and the wheel of the car passed over his foot, and injured it severely.

On the trial, before Mr. Justice JONES and a jury, after these facts were proved, the court on defendants' motion dismissed the complaint, giving the following opinion :

JONES, J. I think the plaintiff must be non-suited. The facts are all conceded, and the question is a question of law. I think the getting off the car while in motion, was negligence on the part of the plaintiff. It is true, it is difficult to get these cars to stop either to get off or on, and perhaps it would be well to sustain actions of this sort, for the purpose of preventing the employment of drivers and conductors by railroad companies, that will not accommodate the public by stopping. I do not feel inclined to go against what I have understood always to be the law in cases of this kind, for the purpose of establishing a doctrine with a view of compelling stoppages. If that is to be accomplished in any way, it must be accomplished in some other way, either by application to the legislature or to the common council, or by some other means that may be devised. The legislature may have power to pass an act that in case the drivers do not stop, the corporations shall be liable for all damages resulting from it. I do not see why, upon principle, the defendant should not be equally as liable for damage incurred by attempting to get on a car in motion, when the driver refuses to stop, as by getting off a car in motion, when the driver refuses to stop. In either case, it may be equally as important for him to get on the car as to get off the car.

I therefore think this motion must be granted, and I will direct the exceptions to be heard in the first instance at the general term.

IRA D. WARREN, *for appellant.*

I. The court erred in dismissing the complaint. The question whether or not the plaintiff was negligent, from all the

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facts proved, was one peculiarly for the jury, and should have been submitted to them under proper instructions.

Negligence is "the omission of that degree of care which a man of common prudence takes of his own concerns." (*Keller* agt. *The N. Y. C. R. R. Co. Court of Appeals*, 24 *How.* 173; *Burrill's Law Dictionary*, 741.)

Whether, under the circumstances of this case, the plaintiff omitted to act with common prudence, was a fact which should have been left to the jury.

The plaintiff had a right to get out of the car at Forty-third street, and the company were guilty of a gross violation of their duty towards him in keeping their car in motion when he requested them to stop.

Whether it was an omission of common prudence to get off the car under such circumstances, is just such a question as should have been left to the jury. (*Bernhardt* agt. *R. and S. R. R. Co.* 32 *Barb.* 169; see opinion of Justice JOHNSON; *Ireland* agt. *O. and H. P. R. R. Co.* 3 *Kern.* 533; *Mayor* agt. *Brooklyn City R. R. Co.* 36 *Barb.* 241; *Clark* agt. *Eighth Av. R. R. Co.* 32 *Barb.* 657; *Fero* agt. *B. and S. L. R. R. Co.* 22 *N. Y.* 209; *Buel* agt. *N. Y. C. R. R. Co.* 31 *N. Y.* 319; *Been* agt. *Housatonic R. R. Co.* 19 *Conn.* 566; 2 *Smith & Bates' Am. R. R. Cases*, 114.)

II. It is not such concurring negligence for a passenger to get off a street car while in motion, when he has previously requested the conductor to stop, and he refuses to do so at the proper time and place, as to deprive him of his action for damages, in case the damages were the result of their refusal to stop the car.

The fault is all with the company. Had they stopped the car, as they were bound to do, no accident could have occurred. This case differs from any reported case, as in this case the defendants had control of the plaintiff's person, and his action was brought about by conduct of the company while grossly violating their duty towards him. Having by their own conduct induced his action, they cannot now attribute that action to him as negligence. In other words, the author of a wrong, who has put a person in a

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position in which he had no right to put him, shall not take advantage of his own illegal act (*Broom's Legal Max.* 4th ed. 204).

III. Assuming that the plaintiff was negligent in getting off the car while it was in motion, yet "where the defendants' negligence was the proximate, and that of the plaintiff remote, the plaintiff is entitled to recover." (*Button agt. H. R. R. Co.* 18 N. Y. 248; *Caldwell agt. Indianapolis R. R. Co.*)

The plaintiff's companion had got off the car while it was in motion, safely. When the plaintiff attempted to get off, the driver took him by the hair, and took off his cap. He reached up one hand to get his cap, and as he did so the driver struck him with his whip. In trying to avoid the blow, he fell and was injured.

It appears from the evidence that the accident was directly and wholly attributable to the driver's conduct in playing with the boy and neglecting his duty.

Whether the accident was attributable to the driver's conduct alone, is a question which should have been left to the jury to determine. (*Hogan agt. Eighth Av. R. R. Co.* 15 N. Y. 383; *Keller agt. N. Y. C. R. R. Co.* 24 How. 173.)

IV. The judgment should be reversed, and a new trial ordered

JOHN W. ASHMEAD, *for respondent.*

First. A party seeking his remedy in damages caused by the negligence of another, cannot recover if his own negligence contributed to the act. The burden is on him to prove affirmatively that he was guiltless of any negligence contributing to the injury (*Butler agt. Hudson River Railroad Co.* 18 N. Y. 248).

Second. "Negligence is the violation of the obligations which enjoin care and caution in what we do. It is either omitting to do something that a reasonable man would do, or the doing something that a reasonable man would not do, in either case causing mischief to a third person—not *intentionally*, for then it would not be negligence." (*Per Baron*

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ALDERSON, in *Blyth* agt. *Birmingham Water Works*, 36 *English Law and Equity*, 506, 508; see also *Carroll* agt. *New York and New Haven Railroad Co.* 1 *Duer*, 571.)

Third. There must be affirmative proof of due care *at the very time of the accident*, and it is said, neither the urgency of business nor the calls of humanity can be taken into account (*Hyde* agt. *Jamacia*, 1 *Williams*, 44).

Fourth. In an action against a railroad company for injuries, where both parties are at fault, the test of the defendants' liability, no design being attributed to them, is whether the injury could have been avoided by ordinary care on the part of the plaintiff (*Brooks* agt. *Buffalo Railroad Co.* 25 *Barb.* 600).

Fifth. If the injury was caused by the concurring negligence of both parties, neither can recover against the other, and the defendant is entitled to a verdict (*Owen* agt. *Hudson River Railroad Co.* 7 *Bosw. N. Y.* 329).

Sixth.—When a railroad company provides a platform or other safe means of exit from their cars at a station, it is the duty of passengers to leave by the way provided, unless it be unsafe, or a justifying necessity exists to escape from peril or injury to life or limb; and it is error to admit evidence to be given to the jury, that persons were in the habit of getting out of the car on the side opposite the platform (*Pennsylvania Railroad Co.* agt. *Zebe and wife*, 37 *Penn.* 430).

Seventh. In order to maintain an action against a corporation for an injury sustained while leaving the cars, the plaintiff must show that he exercised due care; that the corporation were wanting in ordinary care, and that such negligence was the cause of the injury; and if he attempts to leave the cars after they have started, or finding them in motion as he is going out, persists in making progress to get out, and his attempt causes or contributes to his injury, he cannot recover (*Lucas, Administrator* agt. *New Bedford and Taunton Railroad Co.* 6 *Gray*, 64).

Judge METCALF, in delivering the opinion of the court, says: "It is objected to the first of these rulings, that it assumed what should have been left to the jury; that Mrs. Lucas was

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not entitled to special notice of the starting of the train. We have already disposed of this objection by deciding that she was not entitled to such notice. It is further objected, that the effect of this was, that Mrs. Lucas was wanting in ordinary care in not leaving the cars before their time of starting. But this was not its precise effect. Its effect was, that she was wanting in ordinary care in attempting to leave the cars when they were in motion. And of this it is impossible for us to entertain a doubt."

He then adds: "The other objection to the second ruling, that it left to Mrs. Lucas no *locus penitentie*, is to be answered in the same manner as the first objection. The exception states that she went out of the door of the car on the platform, after the cars had begun to move."

On a review of the decisions, we think the following propositions of law are fully established:

First. That a party who attempts to get off a railroad car while it is in motion, or seeing it in motion, persists in getting off, and is injured in so doing, is guilty of such negligence in law as will defeat his action.

Second. That the only adjudicated exception to the above rule is, when a passenger is upon a train, and he sees two trains approaching upon the same track, at such a rate of speed as will make a serious collision inevitable, then the imminent peril to which he is exposed will justify him in quitting the car, and making an attempt to save his life.

Third. That the same rule of law upon the subject of negligence, which will defeat the action of an adult person, will be applied in its full significance to a minor above the age of fourteen years.

Fourth. That the negligence on the part of a plaintiff, which contributed to produce an injury, and which will defeat his action, need not be gross negligence, but slight negligence will be sufficient.

Fifth. The defendant may have been guilty of gross negligence, adequate to have produced all the injury inflicted upon the plaintiff, yet if the plaintiff by slight negligence, contributed to his injury, he cannot recover. This is upon

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the principle stated by Justice SANDFORD, in *Neal* agt. *Gillett*, that "for anything the court can see, although the defendant's negligence was gross, and fully adequate to the production of the injury, yet the plaintiff's exercise of reasonable care would have saved him from its consequences.

Sixth. When injury has been sustained, and both parties are in fault, and no design is imputable to the defendant, the true test of the defendant's liability is, could the injury have been avoided by ordinary care on the plaintiff's part? If it could, he must bear it.

To the foregoing may be added point—

Seventh. That if the occurrence for which the plaintiff sues was a mere accident, happening without negligence on the part of the servant of the defendant, then the plaintiff is not entitled to recover (1 *Hilliard on Torts*).

Eighth. When the suit is brought against the employer for the negligence of his servant, the injury must arise in the course of the execution of some service lawful in itself, but negligently performed; and not in a wanton violation of law by the servant, although occupied about the business of his employer (*Moor* agt. *Sanborne*, 2 *Mich.* 519).

Ninth. It must appear either that the master commanded the unlawful act, or that the injury resulted from the negligence of the servant while he was actually employed in his master's service (*Douglas* agt. *Stevens*, 18 *Miss.* 362). He is not liable for the willful wrong or trespass of the servant (*Hilliard on Torts*, 524).

By the court, GARVIN, J. The plaintiff in this case, in September, 1865, was on the top of one of the cars of the defendant as a passenger, where there were two others, with the driver. After descending from the car one of its wheels passed over his foot and injured him, for which injury, and the damage resulting therefrom, this action is brought.

Upon the trial the court dismissed the complaint, on the ground that the plaintiff was guilty of negligence, such as to defeat the action. The questions presented in this case upon the facts, are of such a character as should have been

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submitted to the jury. It is not entirely clear the plaintiff would have left the car at the time he did, had it not been for the conduct of the driver. The motion of the car doubtless produced the injury; or in other words, if the car had been stationary the wheel would not have passed over his foot. If the driver had stopped and let the plaintiff off, no such injury would have occurred.

It was a clear case of negligence on the part of the defendant, but this is not enough to entitle the plaintiff to recover; the plaintiff must come into court without fault on his part. It was the duty of the driver to stop the car when requested by passengers, and let them off; but if he does not do so, this would not authorize a passenger to negligently expose himself to injury by jumping from the car when in rapid motion, such as to be dangerous to life or limb.

Whether the plaintiff would have got off the car had there been no interference with him by the driver, is not upon the evidence so free from doubt as to authorize the dismissal of the complaint for negligence on the part of the plaintiff. If the plaintiff left the car voluntarily, without interference on the part of the driver, that might constitute such negligence as to defeat the action, provided the car was moving at a high rate of speed. But if he merely rose up preparatory to leaving, indicating to the driver his determination to leave the car, in addition to the request he had already made, and thus induce the driver to stop; and then the driver pulled off his cap, and twice struck at him with a whip, and in dodging, plaintiff fell from the car and received the injury complained of, would present a very different case, and one upon which the court would not have been justified in dismissing the complaint. This version of the case might have been adopted by the jury, and we think is sustained by the evidence before us. Certain facts are undisputed:

1st. The plaintiff was a passenger upon the top of the car.

2d. The driver refused to stop the car when requested.

3d. Plaintiff left the car while it was in motion; but whether plaintiff left at the time he did of his own free will, or whether his action was precipitated by the conduct of the

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driver is not certain, although there was evidence tending to prove it of such a character, that undisputed as it was, in the absence of the testimony of the driver, that would have justified the jury in so finding. This question should have been submitted to the jury.

The evidence also shows that the car was moving at a slow rate of speed, and although the plaintiff was upon the top of the car, it was a question for the jury to say whether the plaintiff was guilty of a want of ordinary care and caution, in descending from the car under such circumstances. It is often quite as safe to step from a car in motion, as if it were stationary; depending upon the rate of speed at which it is moving. A car may be under such rapid headway as to make it imminently dangerous for passengers to leave it. It is not any particular rate of speed by which the conduct of the passengers is to be regulated in entering or leaving cars, that governs; but the rule is, that of exercising ordinary care and caution under the circumstances surrounding them.

It cannot, therefore, be said that the plaintiff, as a matter of law, was guilty of negligence in leaving the car while in motion, even if done voluntarily. Nor can it be successfully contended, that being upon the top of the car was evidence of negligence, for he was called up there by the driver, the car being full in the inside.

Thus far we have considered the case upon the evidence of the plaintiff, in connection with the undisputed facts of the case. We think the evidence of the plaintiff was susceptible of a construction entirely consistent with such want of negligence on his part, as to have required the submission of the case on his part to the jury.

But there is another view of this case which is equally controlling. The witness Hass, testified: "I saw the driver take hold of the boy by the head and by the cap; he took his cap away, then he let him have the cap; then he hit him with the whip; the car was going at slack rate of speed; I saw the boy trying to get off; after the driver hit the boy, he tried to dodge the blow of the whip (probably

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the second blow), and by so doing, he fell and got under the car."

This evidence should have been submitted to the jury in connection with the testimony of the plaintiff; for whether this conduct of the driver was willful or negligent, or otherwise, if the plaintiff was without fault, the defendants are liable for such injuries done while driving a vehicle for the conveying of passengers, in the same manner as the driver would be liable himself (1 *R. S.* §§ 6 and 7, p. 649).

If the jury had found upon these facts, that the act was willful or wanton on the part of the driver, the plaintiff would have been entitled to recover. We must, therefore, sustain the exceptions taken by the plaintiff, and order a new trial, with costs to abide the event.

Judgment reversed.

CITY COURT OF BROOKLYN.

IN THE MATTER OF THE HABEAS CORPUS IN BEHALF OF JOHN H. LOCKWOOD.

The *service of a summons* upon a member of a military company, to appear before a court martial, must be made *personally*, or by leaving such summons at the *residence* of the party to be served. A service made by leaving the summons at the office or place of business of the party, does not give the court martial jurisdiction of the matter.

March Term, 1867.

Before Hon. GEORGE G. REYNOLDS, City Judge.

THE petitioner was a member of the Thirteenth Regiment National Guard, S. N. Y., and was guilty of certain delinquencies in non-payment of fines, and non-attendance at parades and drills.

A court martial was ordered, pursuant to the laws of 1862, and the petitioner was summoned to appear before the court martial and show cause why he should not be fined.

The petitioner failed to appear before the court martial, and was fined the sum of \$36, and a warrant was issued for

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the collection of the fine, and in default of sufficient goods and chattels, from which to collect said fine, to take the body of the petitioner. Under said warrant petitioner was arrested. An application was made for a writ of *habeas corpus*, which was granted, and petitioner was brought before Hon. GEORGE G. REYNOLDS, City Judge.

THOMAS E. PEARSALL, *and*
JESSE JOHNSON, *for petitioner,*

Claimed that the proceedings of the court martial were void, because the summons to appear before the court martial was served upon a person in charge of the office of the petitioner, when the law requires the same to be served "personally, or by leaving such summons at the residence of the party to be served." (*See Sess. Laws of 1862, chap. 477, § 210.*)

P. S. CROOK, *for the military authorities.*

REYNOLDS, City Judge. The prisoner is discharged on the ground that the court martial did not acquire jurisdiction to try the relator.

The statute (*Laws of 1862, chap. 477, § 210*), requires the service of summons to appear before the court to be made personally or by leaving such summons at the residence of the party to be served.

In the case of the relator, the summons was left at 22 Court street, which is not shown to have been his residence, and in fact was conceded on the argument, was his office.

The relator did not appear in response to the summons, and his case was never properly before the court martial for trial.

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COURT OF APPEALS.

HENRY H. BABCOCK and others, respondents agt. FRANCIS A. UTTER, impleaded with others, appellant.

A mere *license* is in its very nature revocable.

If a *parol license* be coupled with a grant, so as to be essential to the enjoyment of the thing granted, then the license may become irrevocable.

But if a *parol license* be coupled with a *grant by parol* of that which can only be effectually granted by deed, then the license remains a mere license, and, therefore, capable of being revoked.

A *riparian owner*, by license of owners above, on the same stream, enters upon their lands, and constructs there a dam and a canal to flow on his lands and work his mill: *Held*, that the license was revocable.

The contrary doctrine considered to be equally in conflict with the common law rule that an easement can only be created by deed; with the statute of frauds, prohibiting the conveyance of any interest in lands other than short leases, without writing; and with the statute requiring deeds for the conveyance of freehold interests.

Nor is the licensor's right of revocation impaired by the fact that the licensee, relying upon the license, had erected expensive works upon his own land, the value of which depended on the use of the canal and dam.

The principle that the owner of lands who encourages another to expend money upon them under an erroneous opinion of title, is *estopped* from afterward asserting his legal rights, is inapplicable to this case. Where there is no fraud on the part of the owner of the land, and the person making the expenditure knows the state of the title, he makes it at his peril, and acquires no equitable rights against the owner thereby. *Mumford agt. Whitney* (15 Wend. 880) reaffirmed *Renick agt. Kem* (14 S. & R. 267), disapproved.

Where one, in pursuance of a license, enters upon another's land, and constructs a dam and canal, and keeps the same in repair, there is no adverse possession; there can be, therefore, no presumption of a grant arising from lapse of time.

A license is a merely personal right, and is not susceptible of conveyance.

A mortgage, therefore, of a mill, the water power of which depends partly upon *parol license* and partly upon grant, will not give the mortgagee title to the former part.

But where the mortgage conveys the premises upon which the mill stands, describing them by metes and bounds, but contains no reference to the mill, nor the word "appurtenances," or any equivalent expression, it conveys, nevertheless, such right to the water power as the mortgagor possesses, not depending upon mere license, although such right may extend beyond the premises actually described in the mortgage. The instrument must be interpreted as though executed and delivered in view of the premises, and, therefore, to convey the mill, as such, with whatever gave it its value as a mill, and which the grantor had power to convey.

Where the owner of land upon a mill stream, *ad medium filum aquæ*, conveys the land by metes and bounds, "beginning at a stake on the bank of the river," running thence by courses and distances around the farm, until it comes again "to

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the U. river," and runs "thence down the bank of the river as it winds and turns, to the place of beginning," the title to the river and the land covered by it, remains in the grantor.

March Term, 1864.

THIS action was commenced by the plaintiffs in the supreme court in equity, in September, 1847, to have their right to a stream of water declared and established; to obtain a perpetual injunction against the diversion of the stream from their factory, and to recover damages for previous diversions.

The facts appearing from the pleadings and the report of the referee, before whom the cause was tried, so far as they have any material bearing upon the questions presented on the appeal, are substantially as follows:

On and prior to April 1, 1820, William Utter, one of the defendants, was the owner of eleven acres of land in the town of Plainfield, Otsego county, and also of another lot of four acres, north of and adjoining the eleven acres; both pieces being bounded on the west by the west branch of Unadilla river. In the year 1821, said Utter, in contemplation of erecting carding and cloth-dressing works on the eleven acres, constructed a dam across said west branch, on lands some distance north of his own, which were owned by Henry Clarke, on the west side, and by Isaiah Hilliard, on the east side of said branch.

During the same year he constructed a canal from said dam, southerly across the lands of said Hilliard, of Thier Johnson, and the two pieces of four and eleven acres before mentioned, to the southerly side of the eleven acres, for the purpose of propelling machinery thereafter to be placed on said premises, with water to be drawn from the dam, through said canal.

In 1821 or 1822, he erected on the eleven acres, a saw mill, and carding and cloth-dressing works, and placed therein machinery proper to be used in such works, and put the same in operation, the propelling power being the water drawn from the dam through said canal.

In 1824, he obtained from Isaiah Hilliard, a lease for the term of ten thousand years, of three-quarters of an acre of

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land, on which the east end of the dam stood, together with the right of flowing so much of the land of said Hilliard, as would be flowed by a dam five feet six inches high, measuring from the bed of the stream, at an annual rent of seven dollars. The canal was made over the lands embraced in this lease.

Henry Clarke verbally consented to the abutting of the west end of the dam on his land, and the canal was constructed across the land of Thier Johnson, with his assent; and the license so given by Clarke and Johnson, the referee finds has never been revoked.

William Utter, and those claiming under him, used said saw mill and clothing works, and carried on the business of sawing lumber and dressing cloth therein, by means of water drawn through said canal, and from no other source, until August, 1831, and there was no other source from which water for that purpose could be obtained.

In August, 1831, said Utter executed and delivered to William Johnson, a mortgage upon the eleven acres upon which the mills and machinery stood, describing them by metes and bounds, but without the word "appurtenances," or other equivalent words, and without any reference to the mills or machinery, or any improvements upon the land. The mortgage was duly acknowledged and recorded, and became a valid lien upon the premises. At the time when the mortgage was given, the mills and machinery were in use, and the water for propelling such machinery was drawn from said canal.

On the 15th of December, 1834, there was due to Johnson upon the mortgage, \$2,611.55, and he thereupon proceeded to foreclose the mortgage by advertisement, pursuant to the statute; and on the 2d of June, 1835, the premises were sold at auction, in accordance with the advertisement, and purchased by the mortgagee. Johnson, by his tenants, occupied the said premises, mills and machinery, from the time of his purchase until April 10, 1846, when he entered into a contract with the plaintiff Babcock, for the sale of the prem-

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ises to him, for the consideration of \$1,100, and gave him immediate possession.

In the following August, the purchase price having been paid, Johnson, by quit-claim deed conveyed the premises to Babcock, who in November thereafter, conveyed five-sixths thereof to his five co-plaintiffs in this action, the purchase having been made originally for the use of all those parties.

The plaintiffs removed the buildings used by Utter for a saw mill and clothing works, and erected in their stead a valuable building for a hoe factory, and used the same for the manufacture of hoes, propelling the machinery with water taken from the dam erected by Utter, and through the canal constructed by him.

William Utter and others, who occupied the eleven acres, and used the mills and machinery thereon, found it necessary on several occasions to repair the dam, and for that purpose to use gravel from a pit on the farm of Henry Clarke, or those claiming under him ; and before making such repairs, on some of those occasions, leave to go upon the farm to get gravel for that purpose, was asked of the owners or occupants, and granted. On some two or three or more occasions, while William Utter was in possession, permission was asked from Henry Clarke to go upon his land to repair the dam. The right of Utter, and those claiming under him to maintain the dam and canal, or ditch, and draw water through the ditch, was never called in question by any of the owners of the lands on which the dam abutted, and over which said canal or ditch was dug, until after the contract was entered into between Johnson and Babcock, in April, 1846, for the purchase by the latter of the eleven acres.

Henry Clarke, who was the relative and intimate friend of William Utter, died in 1831, seized of the farm on which the west end of the dam in question stood, leaving a will duly executed, by which he devised the farm to his three sons. On the 27th of May, in the same year, and after the death of their father, the three sons conveyed the farm to Ethan Clarke, one of the defendants in this action, but bounding him by the westerly bank of said river, instead of by the

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centre, to which the farm extended, as described in the patent from the state to said Henry Clarke. The material part of the descriptive portion of the deed to Ethan Clarke is as follows, viz: "Beginning at a stake and stones on the west bank of Unadilla river, at the north corner of widow Clarke's farm; thence south five chains and thirteen links, to a stake and stones; thence," &c., giving a great number of courses and distances, the two last of which are as follows: "thence north eighty-five degrees east, twenty-four chains and thirty-four links, to the Unadilla river; thence down the west bank of the Unadilla river, as it winds and turns, to the place of beginning, containing," &c.

In March, 1839, William Utter, in consideration of \$50, assigned to the defendant, Francis A. Utter and Jacob S. Utter, the above mentioned lease from Hilliard, and in August, 1846, Jacob S. Utter assigned his interest to said Francis A.

On the 4th of May, 1846, Ethan Clarke, the grantee above mentioned, granted to said Francis A. Utter, by an instrument in writing under his hand and seal, in consideration of the sum of \$15, to be thereafter annually paid by said Utter, the exclusive privilege of maintaining so much of the aforesaid mill dam as was located on said Clarke's premises; also the privilege of controlling the water by dams and dykes, to the centre of said west branch, for fifteen rods above the dam; also the privilege of controlling said water down said west branch along its banks, to the centre of the stream, to the south-east corner of said Clarke's land; also the privilege of taking earth or gravel from the bank, as had been theretofore accustomed, for repairing the dam, with the privilege of access to the gravel bank.

Before this lease was obtained, Francis A. Utter had been informed that Babcock had a contract for the purchase of the mill property; and some time in May, 1846, while the plaintiffs were pulling down the old buildings, preparatory to the erection of the hoe factory, he forbade the plaintiffs to use the water power, claiming to own the water right him-

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self by lease, and he delivered to Babcock a written notice to the same effect, in August thereafter.

After the erection of their new factory, the plaintiffs put the machinery therein in operation, by means of water drawn from said dam through the canal before mentioned, and the water so drawn was the only power used on said premises, from the time of the construction of the dam and canal. The factory would be substantially valueless without the benefit of that water power, and the said premises are valuable mainly for the water privilege created by said dam and canal, and used thereon.

In August, 1847, the defendant Francis A. Utter, employed the other defendants in this cause, to obstruct, and they did obstruct the flow of water from the said dam to the plaintiffs' factory; and they diverted the water from the above mentioned canal, into a bulkhead and canal constructed by them upon the opposite side of the river, upon the farm formerly owned by Henry Clarke. Such obstruction and diversion were made by said Francis A. Utter, under claim of right, under and by virtue of the lease to him above mentioned. The plaintiffs were interrupted in their business by such diversion for the space of twenty-three days, and the damages thereby were \$50.

Upon these facts the referee found as conclusions of law:

1. That William Utter having constructed the dam and canal, with the license of the then owners of the land, on and over which said dam and canal were located, and having erected mills, and placed therein machinery, to be operated with the water obtained from said dam and canal, he and his grantees were entitled to the use of said water, dam and canal, for the factory then on said premises, and that the license so granted was irrevocable.

2. That the rights of Utter to said dam, canal and water, passed to Johnson, the mortgagee, by the mortgage from Utter to him, and the foreclosure and sale under such mortgage.

3. That Utter and those claiming under him, were *estopped* from asserting any claim or right under the Hilliard lease, or

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by virtue of the four acres lying northerly of the mill premises.

4. That the defendant Francis A. Utter, acquired no right to divert the water of said west branch by virtue of the lease from Ethan Clarke, as Clarke had no title to the waters of said branch.

5. That the plaintiffs were entitled to damages for the diversion of said waters, and to the other relief thereafter in the report mentioned.

Then followed a direction for judgment, declaring the right of the plaintiffs to maintain a dam across the west branch, where the same had theretofore stood, at the height at which it had been maintained; to flow so much land as had been theretofore flowed by said dam, and to maintain a canal or ditch from said dam to the factory of the plaintiffs, at the place where the canal had been located and used, and to draw through such canal to their hoe factory, the quantity of water which had been theretofore drawn through the same. And that the defendants be perpetually enjoined from diverting, or in any manner interfering with said dam and canal, or the flow of water in and along the said canal. Also, that the plaintiffs were entitled to recover fifty dollars damages for the diversion of the water, and costs, against Francis A. Utter; and that the complaint should be dismissed as against the defendants William and Morris W. Utter.

Judgment was entered in accordance with the directions of the report, and the defendants having excepted to the conclusions of law found by the referee, appealed to the general term of the supreme court, where the judgment was affirmed, and the defendant Francis A. Utter, appealed to this court.

The cause was submitted on printed briefs by,—

PHILO GRIDLEY, *for the appellant.*

GARDNER & BURDICK, *for the respondents.*

HENRY R. SELDEN, J. The first question presented by this case is, what were the rights of William Utter in this water

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power, when he executed the mortgage of the eleven acres to Johnson, in August, 1831? It is in effect declared by the judgment, that the construction by him of the dam and the canal, in pursuance of the license of Henry Clarke and Thier Johnson, the construction of his mills on the eleven acres, and putting his machinery therein in operation, by water drawn from the river by means of such dam and canal, gave to him as against said Clarke and Johnson, and persons claiming under them, a right perpetually to maintain the dam and canal, and use the water, as they were then maintained and used.

This judgment rests upon the position that the license, after the construction of the dam, canal and mills, was irrevocable. If this position be sustained, then the parol license by means of the expenditure made in pursuance of it, was deprived of its character as a license, and became a grant in fee of the rights claimed by the plaintiff.

In my opinion, this conclusion is in conflict with well established principles. There are many cases in which licenses, so called, and perhaps properly so called, have been regarded as grants, in consequence of their character, and of what has been done under them; but in all such cases, with the exception of a few which have been very generally condemned, (*Browne on Stat. of Frauds*, §§ 28, 29; 3 *Kent's Com.* 453,) the rights which have been established were such as might have been granted by parol. Whenever the right claimed was such as could not be created by parol, it has been denied, whatever may have been done under the license.

The nature of both classes of licenses, those connected with grants capable of taking effect by parol, and those not thus capable, is clearly pointed out by Baron ALDERSON, in his able opinion in the case of *Wood agt. Leadbitter* (13 *M. & W.* 838), in the course of which he states as an illustration of the latter class, the precise case now under consideration. He says (*at p.* 845): "A mere license is revocable, but that which is called a license is often something more than a license; it often comprises, or is connected with a

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grant, and then the party who has given it cannot in general revoke it, so as to defeat his grant to which it is incident. * * * But where there is a license by parol, coupled with a parol grant, or pretended grant, of something which is incapable of being granted otherwise than by deed, there the license is a mere license ; it is not an incident to a valid grant, and is, therefore, revocable. Thus, a license by A. to hunt in his park, whether given by deed or by parol, is revocable ; it merely renders the act of hunting lawful, which without the license would have been unlawful. If the license be not only to hunt, but also to take away the deer when killed, this is in truth a grant of the deer, with a license annexed to come on the land ; and supposing the grant of the deer to be good, then the license would be irrevocable by the party who had given it ; he would be *estopped* from defeating his own grant, or act in the nature of a grant. But suppose the case of a parol license to come on my lands, and there to make a water course to flow on the lands of the licensee. In such a case there is no valid grant of the water course, and the license remains a mere license, and, therefore, capable of being revoked. On the other hand, if such a license were granted by deed, then the question would be on the construction of the deed ; whether it amounted to a grant of the water course, and if it did, then the license would be irrevocable."

The cases of license to enter upon the land of the licensor, and to cut and remove trees, or to dig and carry away gravel, or to quarry and remove marble, and the like, are licenses of the class first mentioned, where the grant connected with the license when executed is valid ; the license in such cases renders lawful the entry and severance of the articles granted, which would otherwise be a trespass, and the grant operates as a gift of the severed article, a parol gift of which would be effectual upon delivery. But if under such a license to take marble, a perpetual right were asserted, on the ground that the license was irrevocable, the case would fall within the second class, and the right could not be maintained, as it could not be created or granted by parol, nor would it aid

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the licensee to show that he had been induced by the license, with the knowledge of the licensor, to erect extensive works on his own adjoining land for the purpose of working the marble (*Broune on Stat. of Frauds*, §§ 27, 28).

The law in this state, and generally in the United States, as well as in England, is in entire accordance with the opinion of Baron ALDERSON, above mentioned. The subject has been so often and so fully discussed, that a review of the cases would be useless labor. *Mr. Washburn*, in his *Treatise on Real Property*, has stated with perfect accuracy the substance of the prominent cases bearing directly upon the point under discussion, and I avail myself of his summary of the cases, as sufficient for the present occasion.

He says: "In the cases of *Cook agt. Stearns* (11 Mass. 533); *Cowles agt. Kidder* (4 Fost. N. H. 364); *Stevens agt. Stevens* (11 Met. 251), and *Mumford agt. Whitney* (15 Wend. 380) the license was to erect a dam or a part of one, on the licensor's land, for raising a head of water to work a mill of the licensee, which was held to be revocable, after the dam had been erected, without reimbursing the licensee for his expenses thereby incurred. In *Morse agt. Copeland* (2 Gray, 302); *Hewlins agt. Shippam* (5 B. & C. 221); *Fentiman agt. Smith* (4 East, 107), and *Sampson agt. Burnside* (13 N. H. 264), the license was to dig a ditch or tunnel in the licensor's land, to divert the water of a stream to or from the land of the licensee, and it was held to be revocable, though executed without remuneration to the licensee for his expenses thereby incurred. In the cases of *Prince agt. Case* (10 Conn. 378), and *Jackson agt. Babcock* (4 John. 418), a license to erect a house on the licensor's land, was held to be revocable after the erection of the house. In *Hazelton agt. Putnam* (3 Chand. Wis. 117), a well considered and ably reasoned case, where the owner of lands licensed the owner of a mill site situate below these, to flow them for the working of his mill, it was held to be a revocable license after the licensee had erected his mill and dam" (1 Washb. on Real Property, 400, and note).

To the same effect are the cases of *Jamieson agt. Milleman*

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(3 *Duer*, 255) ; *Foot* agt. *New Haven and Northhampton Co.* (23 *Conn.* 223) ; *Eggleston* agt. *New York and Harlem R. R. Co* (35 *Barb.* 162).

The decision in the court below is in conflict with all the foregoing cases, and others which might be referred to, and I think it equally in conflict with the common law rule, that an easement can only be created by deed (or its equivalent prescription), within the statute of frauds prohibiting the conveyance of any interest in lands, other than short leases, without writing (2 *R. S.* 134, § 6), and within the statute requiring deeds for the conveyance of freehold interests (1 *R. S.* 738, § 137).

In my opinion, the principle upon which the decision of the court below rests, would substantially repeal the common law rule, and the statute above referred to ; for there is no interest in lands which may not be made the subject of such irrevocable license. As has been well said by *Mr. Chitty* : " If a person could acquire a perfect right by a license, any one has only to get a person to swear to a parol license by the owner of land, to build a house upon it, and thereby, without any conveyance by deed, he would acquire in effect, all the beneficial right of an owner in fee." (1 *Gen. Prac.* 339 ; *Benedict* agt. *Benedict*, 5 *Day*, 464 ; *Browne on Stat. of Frauds*, § 29.)

We have been referred to no reported cases having any tendency to sustain the decision that the license in question was irrevocable, except those of *Rerick* agt. *Kern* (14 *S. & R.* 267), and *Hepburn* agt. *McDowell* (17 *Id.* 383). The last of these cases contains nothing inconsistent with the rule to be deduced from the cases to which I have referred, excepting the approval by the judge who delivered the opinion, of the case of *Rerick* agt. *Kern*.

The latter case, treating it as one of license and not of contract, is certainly not law in this state, if it is any where beyond the jurisdiction within which it was decided. (*Jamieson* agt. *Milleman*, 3 *Duer*, 261 ; 1 *Washburn on Real Property*, 400, note.)

The note of Messrs. Clark & Wallace, in the case of *Rerick*:

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agt. *Kern* (2 *Am. Lead. Cases*, 514, 1st ed). So far as an attempt is made to sustain the soundness of that decision, is not very satisfactory, and the learned authors seem not to have found much in the way of authority to support it. The effort to sustain it appears to have deprived the note of the clearness and consistency which usually characterize the notes in that valuable work.

The English cases which have been supposed to give some support to the doctrine of irrevocability of licenses under such circumstances as this case presents, were reviewed by Baron ALDERSON, in the opinion before referred to, and their insufficiency to sustain that doctrine was clearly demonstrated.

There is another class of cases which have been invoked in support of the same doctrine, viz: where the owners of lands who have encouraged others to expend money upon them under an erroneous opinion of title, have been prohibited from afterwards asserting their legal rights (*Wendell* agt. *Van Rensselaer*, 1 *Johns. Ch.* 354). The basis of these cases is fraud on the part of the owner of the land, and where the person making the expenditure knows the state of the title, he makes it at his peril, and acquires no equitable rights against the owner thereby (*Browne on Stat. of Frauds*, § 29).

The doctrine of the presumption of a grant arising from twenty years adverse possession, has been urged in support of the plaintiff's claim; but where one enters and holds in pursuance of a license, the holding is not adverse, and no such presumption can arise out of it.

It follows from what has been said, that the only right which William Utter possessed at the time of the execution of his mortgage to Johnson, to so much of his water power as depended upon the license of Henry Clarke, was the right to the use of such power so long as the heirs or assigns of Henry Clarke saw fit to allow such use, and no longer. That right was merely personal, and was not susceptible of conveyance to another party (*Browne on Stat. of Frauds*, § 22). Johnson, therefore, derived no title to that portion of the water power, through the mortgage of Utter. As

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Henry Clarke owned upon one side of the river, and Isaiah Hilliard upon the other, where the dam was erected, each was the owner of one-half the stream, and, consequently, this deficiency of title in Johnson, extended to one-half of the water power.

As to the other half of the stream, Utter had a perfect title, so far as related to the right to maintain the dam for the long term specified in his lease from Hilliard, and to draw the water from the river, and through the canal for its whole length, excepting that part where it crossed the lands of Thier Johnson, and in that respect his right (upon the principles above laid down) depended entirely upon the pleasure of Thier Johnson, or of those who may have become his successors. That right too, derived from the license of Thier Johnson, was merely personal, and did not pass by force of the mortgage to William Johnson.

Utter, however, had power to convey the entire right to this half of the water power, subject to the right of Thier Johnson to revoke the license allowing the maintenance of the canal, and the flow of water across his land.

The question then arises, whether by the mortgage to Johnson, Utter conveyed all the right which he possessed in this half of the water power (which would give to the mortgagee a perfect title, with the exception of the right to maintain the canal and conduct the water across Thier Johnson's land), or only so much of his right as was comprised within the boundaries of the eleven acres described in the mortgage.

I entertain no doubt upon this question. At the time when the mortgage was executed, the mill was in operation, its machinery being driven by water drawn from the river, by means of the dam and canal, and such right to the water power as the mortgagor possessed, not depending upon mere license, and, therefore, incapable of conveyance, passed by the mortgage to the mortgagee (*Huttemeier agt. Albro*, 18 N. Y. 48). It is not material in this respect that the conveyance does not contain the word "appurtenances," or any equivalent expression, nor that it contains no reference to

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the mill. The deed is to be interpreted as though it had been executed and delivered between the parties in view of the premises; and thus interpreted, it must be held to convey the mill, *as such*, as fully and completely as if it had been expressly named in the grant; and with the mill, all the appurtenances which at the time were connected with it, and which gave it its value as a mill, so far as the grantor had power to convey the same. This is expressly decided in the case of *Oakley agt. Stanley* (5 *Wend.* 523), and there is nothing in the judgment in the case of *Tabor agt. Bradley* (18 *N. Y.* 109), under the peculiar circumstances disclosed in that case, which is inconsistent with this position.

William Johnson, therefore, by virtue of his mortgage, and its foreclosure, obtained a title to one-half of the water power, subject to the right of Thier Johnson to stop the flow of the stream across his premises at pleasure, and, perhaps, subject also to a forfeiture of his right to the water in case of default in payment of the rent on the lease of Hilliard. The conveyance of the mill did not operate as an assignment of the whole interest of the lessee in the demised premises, but only of his right to maintain the dam and canal, and to conduct the water across such premises. If the lands leased possessed value for any other purpose, to that extent the interest of the lessee was not affected by the mortgage to Johnson, but passed to Francis A. Utter, on the assignment of the lease to him. The rent in such case would doubtless be apportioned between the assignees, according to the value of their several interests. (*Gilbert on Rents*, 153; 3 *Kent's Com.* 470; *Van Rensselaer agt. Bradley*, 3 *Denio*, 143.)

This qualified title to one-half the waters of the river was vested in the plaintiffs at the time of the commencement of the action, and it constituted the extent of their *title* to the water power which they were using at the time of the interference by the defendants. What right they had as licensees or otherwise, to the other half of the waters of the river, depends upon the state of the title to that half, which is next to be considered.

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It has already been shown that the title to one-half the waters of the river, notwithstanding the license to Utter, and what was done by him in pursuance of such license, remained in Henry Clarke at the time of his death, as he had the right at any time during his life to revoke the license, remove the dam, and apply the waters to any use, or allow them to flow in their natural channel. This title passed by his will to his three sons, and remains in them still, so far as the case shows, unless it passed to Ethan Clarke, by virtue of the conveyance of the farm by them to him on the 7th of May, 1831. The description in that conveyance begins, "at a stake and stones on the west bank of the Unadilla river," as a starting point in the boundary line, and runs thence by courses and distances around the farm, until it comes again "to the Unadilla river," and runs "thence down the west bank of the Unadilla river, as it winds and turns, to the place of beginning."

The words, "to the Unadilla river," according to the usual interpretation of such an expression in conveyances, would carry the line to the centre of the river, as the general rule is, that where a line touches a river it goes to the centre; but the words are entirely consistent with an interpretation which should stop the line at the margin or bank of the river; and whether the one or the other interpretation should be given to them, must depend upon the apparent intention of the parties, to be determined by reference to the other portions of the deed.

The other expressions of the deed which have reference to the river, I think show a clear intention to limit the operation of the grant to the bank of the river. The starting point is unequivocally from "the bank," and not from the centre of the river, and if the last line in the description is confined to the centre of the river, it cannot run "to the place of beginning," as the description requires; and if it starts from the centre of the river, and runs "to the place of beginning," it would neither follow the centre of the river, nor "the west bank as it winds and turns," according to the description of the deed. From the terms of the deed

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alone, I think it must be held to convey the farm to the west bank of the river only, leaving the title to the river and the land covered by it in the grantors. (*See Child agt. Starr, 4 Hill, 369.*)

This construction is strongly confirmed by the circumstances which may properly be considered as bearing upon the interpretation of the deed, that the river was at the time of the execution of the deed by the grantors, controlled and used by their father's friend, in pursuance of a license granted by him ten years before his death, and which he had not seen fit during his lifetime, nor the grantors, his sons, after his death, to revoke.

It will thus be seen that the right to that part of the water which is not vested in the plaintiffs, remains in the three sons, devisees of Henry Clarke. Ethan Clarke obtained no title to it by his deed from them, and consequently, conveyed none by his demise to Francis A. Utter. The defendants, therefore, were entirely without any right to interfere with the dam, or to divert the water of the river from the plaintiffs' factory.

The only remaining question is, whether the plaintiffs are entitled to recover damages for the diversion of the water. It appears that the whole stream was diverted from their factory, and as their title to half of it was complete, so long as Mr. Thier Johnson allowed it to flow across his premises, there can be no doubt of their right to recover the damages occasioned by the diversion of such half. In regard to the other half, their rights, so long as the license to use it remained unrevoked, was a perfect possessory right, sufficient to sustain an action for its diversion, against strangers.

The referee reported that the license had never been revoked, by which I understand that there had been no direct revocation by Henry Clarke or his successors in interest. The death of the original licensor was itself a revocation (1 *Washburn on Real Property*, 399, § 9), but it was optional with his devisees to enforce the revocation, or renew or continue the license, and their acquiescence in the use of the water by the licensee and his successors, from the death of

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their father in 1831, until the time of the commencement of this action in 1847, without interfering with or forbidding such use, may doubtless be regarded as sufficient evidence of the confirmation of the license by them, in favor of the successive occupants of the mills. The plaintiffs were, therefore, entitled to recover the damages which they sustained by the diversion of the water, unless a revocation of the license by the devisees of Henry Clarke, prior to such diversion, can be shown. As the license was held irrevocable on the former trial, there was no object in the introduction of proof of such revocation, if it existed, as it would have been under that ruling wholly unavailing.

The judgment of the supreme court should be reversed, and a new trial should be granted as against the defendant Francis A. Utter, the costs to abide the event.

The defendant Ethan Clarke, has not appealed from the judgment of the general term of the supreme court, and that judgment as against him remains undisturbed.

Isaiah Hilliard, who is named in the papers as a defendant, does not appear to have been served with process, or to have appeared voluntarily, and he is not, therefore, a party to the action.

The judgment dismissing the complaint as against the defendants William Utter and Morris W. Utter, has not been appealed from, consequently they have ceased to be parties, although their names are still continued in the papers.

In all future proceedings Francis A. Utter alone, will be the only proper party defendant.

All the judges concurring, judgment reversed.

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SUPREME COURT.

CHARLES BARTON AND JOHN R. OLMSTEAD agt. SIMON BUTTS
AND ADDISON R. WHITNEY.

The supreme court, by virtue of its general inherent powers, has jurisdiction and authority, to a certain extent, not only over parties before it, but over its judgments, decrees and orders, also.

Under these general powers, it may vacate and set aside orders taken by default, or those irregularly or improvidently made ; judgments taken by default or irregularly entered ; and stay the further prosecution of any action after the plaintiff has accepted payment of his claim, during its pendency, or obtained satisfaction thereof by means of some other remedy.

Where a party has been arrested upon an *attachment* for contempt, and has given a bond with sureties for his appearance at court, to abide the order of the court, and has been adjudged to have been guilty of the misconduct alleged, and punishment by fine and imprisonment ordered, the statute does not authorize the bond to be prosecuted at the same time that a warrant of commitment is issued against the party. It is not the policy of the statute to give the aggrieved party two final and complete remedies for the same offence.

Seventh Judicial District, General Term, March, 1867.

Present, WELLES, E. D. SMITH, and JOHNSON, Justices.

APPEAL from order at special term.

One Kintz, the defendant in an equitable action, was proceeded against by attachment as for a contempt, in neglecting or refusing to execute and deliver certain obligations and securities, as required by the decree against him in that action. He was arrested on the attachment, and gave a bond with the defendants as sureties, conditioned that he should appear on the return of the attachment and abide the order and judgment of the court therein. At the the next special term held in the city of Rochester, at which the attachment was returnable, Kintz appeared from day to day, and remained until the adjournment of court for the day, until Saturday of the term, when he appeared, and remained until between four and five o'clock, P. M., when being informed by some one that the business before the court would not be finished that week, and that the court would soon adjourn over until Monday morning, and that his matter would not be taken up that day, he left the court and went to his place of resi-

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dence, some four or five miles from the city, intending in good faith to return and appear again in court at the opening thereof, on Monday morning. Interrogatories had already been filed and answered. Shortly after Kintz thus left, the proceeding against him was taken up, and he was found to have been guilty of the misconduct alleged, and was fined and ordered to be committed to the jail of the county until he should pay such fine, and the costs of the proceedings on the attachment, and execute and deliver the obligations and securities required by the decree.

A process of commitment was forthwith issued against Kintz, on which he was arrested the same evening and committed to jail, where he remained until the order appealed from was made, and still remains.

The court at the same time, on the application of the plaintiffs, ordered the bond given upon the arrest to be prosecuted.

Under this order, this action was brought against the defendants as sureties of Kintz, although not until several days after Kintz had been committed to jail, as aforesaid.

Upon affidavits establishing the foregoing facts, the court at special term made an order staying all proceedings in the action perpetually, and discharging the defendants from their liability, by reason of the bond, upon payment by them of the costs of this action, the costs of opposing the motion, and the sheriff's costs for arresting Kintz and committing him to jail.

From this order the plaintiffs' appealed to the general term.

W. F. COGSWELL, *for plaintiffs.*

T. R. STRONG, *for defendants.*

By the court, JOHNSON, J. It is contended by the plaintiffs' counsel that the court had no jurisdiction or authority whatever, to make the order appealed from.

The argument is, that by the order to prosecute the bond, the plaintiffs became the assignees thereof, and acquired

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thereby a vested right to recover and collect the damages which the statute gives in such a case, and that no court could afterwards take away, or in any degree impair, such right.

The defendants are not, as is urged, strictly special bail, and neither the statute nor the rules of practice in reference to such bail, are applicable to this case. But I am clearly of the opinion, nevertheless, that the court had the power to make an order in substance and effect, like the one appealed from, if not in the precise form. In form, I think, it should more properly have been an order vacating and setting aside the order for the prosecution of the bond. This would have reached the same end, and accomplished the object of the motion in a less objectionable form. But the form of the order is not very material, upon this question of the power of the court over the plaintiffs' action.

This court, by virtue of its general inherent powers, has jurisdiction and authority, to a certain extent, not only over parties before it, but over its judgments, decrees and orders also. Under these general powers, it may vacate and set aside orders taken by default, or those irregularly or improvidently made; judgments taken by default, or irregularly entered; and stay the further prosecution of any action, after the plaintiff has accepted payment of his claim during its pendency, or obtained satisfaction thereof by means of some other remedy.

The plaintiffs' right of action in this case sprung from the order of the court, made upon the unintentional default of Kintz, the principal, in not appearing at the moment the proceedings against him were taken up. He did not intend to escape the punishment which might be adjudged against him, and did not. He was arrested upon the warrant of commitment and imprisoned, and the entire object of the proceeding against him accomplished, at least *pro tanto*.

It was obviously, not the design of the statute in such a case, to give the prosecuting party a double satisfaction; and it may, I think, well be doubted whether it was regular to order the bond to be prosecuted at the same time that a

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warrant of commitment is issued. The statute (2 *R. S.* 539, § 27), provides that in case the defendant does not appear on the return day of an attachment which has been issued and served, the court may award another attachment, or may order the bond taken on the arrest to be prosecuted, or both. The object of the new attachment in such a case, plainly is to give the defendant an opportunity to purge, if he can, the alleged contempt. Should he do so at the return day of the new attachment, the entire foundation of the action given by the order would be taken away, except, perhaps, so far as respects the right to costs.

But here the defendant was adjudged to have been guilty of the misconduct alleged, and punishment by fine and imprisonment ordered, together with a warrant of commitment to carry the sentence into effect. It will be seen that the statute does not both authorize the order to prosecute the bond and the issuing of the final warrant of commitment at the same time, but a new attachment and the order to prosecute together, only. The question of irregularity, however, in making the order to prosecute, does not arise in the case, as no question seems to have been made upon it in the motion, and I have referred to it only for the purpose of showing that the policy of the statute plainly was not to give the aggrieved party two final and complete remedies for the same offence.

In the present case, the judgment or order, and sentence of the court was fully and completely executed and satisfied by the arrest and imprisonment of the offending party on final process, for the time being, at least; and while such satisfaction was continued by the prosecuting party, it was clearly within the power of the court to restrain him from pursuing another remedy founded solely upon an order of the court, against other parties.

The undertaking of the sureties, had been in substance and effect, fully performed. Their principal, Kintz, had appeared, and was only temporarily, and by mistake, absent when the order was made; and he did in fact, abide the order and judgment of the court, which were executed upon his

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person, and carried into full and complete effect, by means of the final process for his commitment. After the plaintiffs had pursued their remedy against the principal, Kintz, to a final judgment or order, and obtained a final process therein of commitment, and thus compelled him to abide the order and judgment of the court in the proceedings, all that the defendants undertook as sureties to do, was accomplished, and their undertaking, in substance and effect, became performed and satisfied.

Where a defendant in such a proceeding has not appeared at all, and the bond has been prosecuted in pursuance of such an order, the court may still allow him to appear upon terms, at a future term, and answer interrogatories to be filed, touching the contempt (*The People agt. Munro*, 15 How. Pr. R. 494). If he is found not guilty of the contempt at such future day, no one, I think, would doubt the power of the court to stay the further prosecution of the action on payment of costs.

I am of the opinion, therefore, that the order was substantially correct, and should be affirmed.

Ordered accordingly.

UNITED STATES SUPREME COURT.

THE STEAM VESSEL MOSES TAYLOR, plaintiff in error agt.
WILSON HAMMONS.

The state courts have no jurisdiction of civil causes in admiralty.

Under the constitution of the United States, and the judiciary act of 1789, the United States courts have *exclusive* cognizance of civil causes of admiralty and maritime jurisdiction.

A contract made by a passenger, for a passage to California, with the owner of a line of California steamers, by which, in consideration of \$100, the owner agrees to transport the passenger from New York to San Francisco, as a steerage passenger, with reasonable dispatch, and furnish him with proper and necessary food, water and berths, or other conveniences for lodging on the voyage, is a contract of admiralty and maritime jurisdiction; and for a breach of which, the United States courts of admiralty have exclusive jurisdiction.

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December Term, 1866.

IN ERROR to the county court of the city and county of San Francisco.

In this case the summons reads as follows :

"State of California.—In the justice's court of the sixth township, in and for the city and county of San Francisco :

"The people of the state of California, to the steam vessel Moses Taylor, greeting :

"You are hereby summoned to appear before me at my office, in the sixth township of the city and county of San Francisco, on the 16th day of November, A. D., 1863, at two o'clock, P. M., to answer unto the complaint of Wilson Hammons, who claims to recover of you the sum of \$200 damages, for the alleged non-performance of contract of the said Wilson Hammons, as a steerage passenger, from the city of New York to San Francisco ; said contract having been made with the owner and agent of the steam vessel Moses Taylor, as per complaint on file in this office, when judgment will be taken against you for the said amount, together with costs and damages, if you fail to appear and answer.

"To the sheriff or any constable of the said city and county, greeting : Make legal service and due return hereof.

"Given under my hand, this 12th }
day of November, A. D., 1863. }

"MARTIN W. LAMB, [L. S.]

"Justice of the peace of said township."

[Indorsed.]

"I hereby certify that I have served the within summons, by delivering a true copy thereof to J. H. Blethen, commander of the steam vessel Moses Taylor, at the city and county of San Francisco, this 13th day of November, A. D., 1863.

"J. J. LAMB,

"Constable, sixth township.

"Filed January 2d, 1864.

"W. HARNEY, D. C."

The libel or complaint ends thus : "Wherefore, the said plaintiff demands judgment against the said steam vessel Moses Taylor, for the sum of \$200, with costs of suit."

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The answer by the agent of the vessel says, that this (the justice's) court has no jurisdiction. "That this court has no jurisdiction of the cause of action in said complaint contained, nor of the said steam vessel Moses Taylor, because, he says, that the said cause of action as against the said vessel, is a cause of action of which the courts of admiralty have exclusive jurisdiction. That said vessel is used exclusively in navigating the high seas, and that said cause of action, if any, arose on the high seas."

The judgment of the township justice of the peace is as follows :

"November 16, 1863.—Case called at one o'clock P. M. Plaintiff by Van Arman, Lane & How ; defendant by Delos Lake, in court. Defendant files an answer to the complaint. John Mulligan, Wm. Harding and A. N. Starling, sworn and examined as witnesses for plaintiff. Plaintiff rests. Case closed and submitted. Whereupon, on the 21st day of November, 1863, this court renders judgment in favor of the plaintiff and against the defendant, for the sum of two hundred dollars damages, and costs of action.

"Justice's fees \$5 ; constable's fees \$1.75.

"Notice of appeal and appeal bond filed by defendant, December 3d, 1863.

"I hereby certify the foregoing to be a true and correct transcript of my docket of the above entitled cause, and the papers hereunto attached, are all that have been filed with said action.

"MARTIN W. LAMB.

"Justice of the peace, sixth township."

The county court affirmed the judgment of the township justice, and on writ of error, the cause comes before this court.

The plaintiff alleges in his complaint, that Marshall O. Roberts was part owner of the vessel, and agreed to carry him, the plaintiff "from New York to San Francisco, as a steerage passenger, with all reasonable speed, to furnish the plaintiff with proper and necessary food, water and berth, or other convenience for lodging, while on said voyage."

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The wrong for which the vessel is made liable is stated as follows: " Yet the said Marshall O. Roberts, did not perform on his part, the said contract ; but on the contrary, failed to carry, or cause to be carried or conveyed, the said plaintiff with reasonable dispatch from New York to San Francisco, and also failed to furnish to said plaintiff proper and suitable food or water, or proper and necessary berths or conveniences for lodging while on said vessel, but the said plaintiff was in fact detained on said passage on the Isthmus of Panama for a long time, to wit, for the period of eight days. In consequence whereof, the said plaintiff was compelled to, and necessarily did, incur heavy expense in procuring board and lodging, and sustained heavy damages in the loss of time ; and that the provisions furnished by the said agent and owner, and by the said boat to the said plaintiff, while on the voyage, were unwholesome, and unfit and improper for the said plaintiff or any other human being to eat, and greatly injured the health of said plaintiff.

" That the plaintiff was crowded into a loathsome, unhealthy cabin, without sufficient room or air for health or comfort, in consequence of a large number of steerage passengers ; more than said boat was allowed by law to, or properly could carry.

" That in consequence of the non-performance of said contract on the part of the said agent and owners, as aforesaid, the said plaintiff has sustained damages in the sum of two hundred dollars.

" Wherefore, the said plaintiff demands judgment against the said steam vessel Moses Taylor, for the sum of two hundred dollars, with costs of suit.

VAN ARMAN, LANE & HOWE,
Plaintiff's Attorneys.

The court finds that the plaintiff was detained seven days on the voyage, and further finds: " That said Roberts failed to furnish to plaintiff, on the voyage from Panama to San Francisco, on board said steamship Moses Taylor, proper and wholesome food, a suitable supply of water for washing purposes, proper and necessary berths and ship room ; and

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that said plaintiff, by reason of such detention, and of said failure to supply proper and wholesome food, a suitable supply of water, and proper and necessary berths and ship room, as aforesaid, has sustained damage in the sum of two hundred dollars, and as a conclusion of law, the court finds that this court has jurisdiction of the subject matter of this action, and that said defendant is liable for the damages sustained by plaintiff, by reason of the failure of said Roberts to perform his contract with plaintiff, as aforesaid ; and that plaintiff is entitled to a judgment against the said defendant for the sum of two hundred dollars, besides costs.

"Let judgment be entered accordingly.

"SAMUEL COWLES,
"County Judge."

DE LOS LAKE, *attorney, and*

EDWARDS PIERREPONT, *counsel for plaintiff in error.*

The ground of complaint is, that on the voyage from Panama to San Francisco, the Moses Taylor was unlawfully crowded, and the plaintiff did not have the berths, ship room, food or water to which he was entitled. What those comforts were, or to what amount of luxury, a steerage passenger, paying \$100 from New York to San Francisco, is supposed to be entitled to, does not appear.

The question in this case is, whether a California justice of the peace can proceed in admiralty against the steamship Moses Taylor, and this involves the question whether such justice of the peace can make a valid decree in admiralty, against a French or English ship.

The case is one of great national importance, and fifty-five other suits await the decision of this.

It seems well settled that on this side of the Rocky Mountains, a village justice of the peace has no admiralty jurisdiction, and that his condemnation in admiralty of a British, French or Russian vessel, would not be respected by the world.

First. The question made by the case is, whether a town-

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ship justice of the peace can proceed in admiralty against a foreign steamer, for wrongs or inconveniences suffered by a passenger on the high seas.

If Justice Patrick Larry Maloney, asserting his admiralty jurisdiction in New York, should proceed to a decree in admiralty against a Cunard steamer, on the ground that Biddy did not get as good victuals in the steerage as she had expected, on her voyage to a "free country," a sale of the steamer under such judgment would hardly be respected by the world.

Decrees in admiralty are respected everywhere. If the township justice and the United States judge should issue process against the Cunard steamer Persia, on the same day, the justice would pronounce his decree in six days, sell the ship, and leave the tardier judgment of the United States court a barren remedy. This *concurrent* jurisdiction would be found inconvenient, and foreign nations might complain that the admiralty learning of the village justice of the peace, was not quite adequate to such high jurisdiction, and lead to conflicting judgments and intolerable uncertainty.

Second. The principle is the same, whether the passenger goes from Liverpool to San Francisco on the Persia, or from New York to San Francisco on the Moses Taylor.

An agreement to transport a man or a horse over the ocean, is a "maritime contract," and comes under the admiralty and maritime jurisdiction; and it matters not whether the ship on her voyage stops at Bermuda, Cape Horn or Panama. (*The Schooner Tiltan*, 5 Mason, 465; *Plummer agt. Webb*, 4 Mason, 380; *Drinkwater agt. The Brig Spartan*, Ware's Rep. 91; *Steel agt. Thatcher*, Ware's Rep. 149; *De Sovio agt. Boit*, 2 Gallison, 398; *The Sloop Mary*, 1 Paine's Rep. 673; *Davis agt. A Nev. Brig*, Gilp. 473; 1 Kent's Com. 370, 371; *New Jersey Steam Navigation Co. agt. Merchants' Bank*, 6 How. 344; *Bazin agt. Liverpool Steamship Co.* 5 Am. L. J. 465.)

Third. The courts of California have decided that a township justice has admiralty jurisdiction, and can proceed in admiralty against a foreign ship.

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In *Taylor agt. The Steamer Columbia* (5 Cal. 268), the head note reads thus :

"The judicial power of the courts of the United States, in admiralty and maritime cases is not exclusive, and the states have the power to confer that jurisdiction to its fullest extent, upon their own state courts."

Judge HUYDENFELDT, delivering the opinion of the court says (page 272) :

"In the case of *Averill agt. The Steamer Hartford* (2 Cal. 308), we decided that the act providing for actions against steamers, vessels and boats, confers upon the district courts (of California) admiralty jurisdiction *pro tanto*, and the proceedings in such actions must be governed by the principles and forms of admiralty courts, except when otherwise controlled and directed by the act." * * * "In the case of *Gordon agt. Johnson* (4 Cal. 368), we had occasion to examine and settle the proper rule of construction, as to the judicial powers relatively of the federal and state governments. Taking as our point of departure, the universally conceded principle, that the states are original sovereigns, with all the powers of sovereignty not expressly delegated by the federal compact." * * * "This subject, however, was fully examined in the case of *Gordon agt. Johnson*, before cited, and we are satisfied to adhere to our treatment of the proposition as then laid down. It results from the views we have taken, that the states are not deprived by the constitution of the United States, of the power to confer upon their own courts all admiralty and maritime jurisdiction."

"The treatment of the proposition" in *Johnson agt. Gordon* (4 Cal. 368), was administered by the same learned Judge HUYDENFELDT, and resulted in the following conclusions :

"No cause can be transferred from a state court to any court of the United States.

"Neither a writ of error nor appeal lies, to take a case from a state court to the supreme court of the United States."

It is evident that the learned judge was afterwards more than satisfied with his "treatment of the proposition," in *Johnson agt. Gordon* (2 Cal). Since in that case he only

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decided that the state court had admiralty jurisdiction *pro tanto*. But in *Taylor* agt. *The Steamer Columbus* (5 Cal.), he decided that the state court had admiralty jurisdiction *in toto*.

I have hopes that this court may not be quite so well "satisfied" with this "treatment," as the learned judge who prescribed it.

Fourth. The first section of the third article of the constitution of the United States, is as follows :

"The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish."

And the first clause of the second section of the same article, is in these words :

"The judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made or which shall be made under their authority, to all cases affecting ambassadors, other public ministers and consuls. To all cases of admiralty and maritime jurisdiction." * * *

The ninth section of the judiciary act of 1789, declares that "the district courts shall have, exclusively of the courts of the several states, * * * cognizance of all civil causes of admiralty and maritime jurisdiction; * * * saving to suitors in all cases, the right of a common law remedy, where the common law is competent to give it."

From the passage of that act until the decision in 5 Cal. Rep., above cited, a period of sixty-five years, the exclusive jurisdiction of the courts of the United States in "all cases of admiralty and maritime jurisdiction," was everywhere conceded.

The discovery was first made by Mr. Justice HEYDENFELDT, that in consequence of the "original sovereignty" of California, the judiciary act of 1789 was unconstitutional, and that the courts of the United States had no exclusive jurisdiction in the admiralty, but only concurrent jurisdiction with a township justice of the peace in California; and the learned judge expressed himself as "satisfied to adhere

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to his treatment of the proposition," and with his "point of departure," as he calls it, on account of California's "original sovereignty."

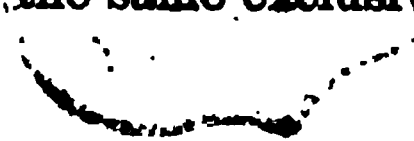
We have here something novel to meet; something quite beyond the pretensions of South Carolina in her boasting days; South Carolina is an ancient state, older than the judiciary act or the constitution. But California was not born until some sixty years after the passage of that act, and then she was fashioned by the power of the United States out of her own territory—bought with a price. It is interesting to hear this *naïve* talk about the "original sovereignty of California," which is to override the judiciary act and the uniform decisions of seventy years. Where got California this "original sovereignty?"

We ask the court to smother out this secession brand, before it wrap in smoke and flames of war the Pacific coast, as late it did the Atlantic shore. This was the accursed heresy which bred our fratricidal war; spread woe and desolation over the whole south; consigned to bloody graves five hundred thousand of our youth, and ante-dated death to more than a million of our countrymen.

Fifth. The constitution of the United States declares, that "the judicial power shall extend to all cases of admiralty and maritime jurisdiction." And following the constitution, the judiciary act, which has been in force now seventy-seven years, declares the exclusive jurisdiction of the courts of the United States "in all cases of admiralty and maritime jurisdiction."

This exclusive jurisdiction has for seventy years been the settled law, and has been repeatedly affirmed by the courts.

In *Martin agt. Hunter* (1 *Wheaton*, 337), the court says: "It is manifest that the judicial power of the United States is, unavoidably, in some cases, exclusive of all state authority, and in all others may be made so at the election of congress. No part of the criminal jurisdiction of the United States can, consistently with the constitution, be delegated to state tribunals. The admiralty and maritime jurisdiction is of the same exclusive cognizance."



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An affirmation of this exclusive jurisdiction will be found in the opinion of Chief Justice MARSHALL (*Slocum* agt. *Mayberry*, 2 *Wheat.* 9); and of Mr. Justice STORY, in *Gelston* agt. *Hoyt* (3 *Wheat.* 246); and of Mr. Justice WAYNE, in *Waring* agt. *Clarke* (5 *How.* 451); and of Mr. Justice CATRON, in *Waring* agt. *Clarke* (5 *How.* 466); and in the case of *The Bark Chusan* (2 *Story's Rep.* 455).

And in 2 *Story's Commentaries on the Constitution* (§ 1672), it is said that "the admiralty jurisdiction naturally connects itself on the one hand with our diplomatic relations, and the duties to foreign nations and their subjects; and on the other hand, with the great interest of navigation and commerce, foreign and domestic: there is, then, a peculiar wisdom in giving to the national government a jurisdiction of this sort which cannot be yielded, except for the general good, and which multiplies the securities for the public peace abroad, and gives to commerce and navigation the most encouraging support at home."

And in *Cohen* agt. *Virginia* (6 *Wheat.* 314, 315, 325), it was conceded that the federal courts had the "exclusive admiralty and maritime jurisdiction."

And in *Martin* agt. *Hunter* (1 *Wheat.* 372), Mr. Justice JOHNSON says: "With regard to admiralty and maritime jurisdiction, it would be difficult to prove that the states could resume it, if the United States should abolish the courts vested with that jurisdiction."

The United States District Court for the district of Missouri, in the case of *Ashbrooks* agt. *The Golden Gate*, says: "The only exception to the exclusive cognizance is not a remedy in the common law courts, but a common law remedy, no matter in what state court it may be brought, or what may be the system under which the court may proceed. There is also a qualification of this saving of a common law remedy. It can be only in a case 'where the common law is competent to give it.' This qualification was, doubtless, intended to cut off new remedies which might be devised, but which were unknown to the common law; for if the common law was not competent to give the remedy sought, then

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the party could not resort to any other, but must sue in the United States court in admiralty.

“A suitor cannot, therefore, say, ‘a common law remedy is saved to me, and if there be none to effect my object (the seizure of a vessel), I can use any the legislature may have devised for my case.’” * * * “What lawyer ever knew or heard of a proceeding *in rem*, as a common law remedy? Even the actions of detinue or replevin have in them nothing of the nature of proceedings *in rem*. Each requires a plaintiff and defendant, who are persons, and the judgments bind no one but parties and privies. True, a proceeding *in rem* may be used in common law courts of the states, but in all such cases it is given by statute, or is a proceeding under the civil law. And the fact that it is given by statute, and did not exist before the statute which gave it, in states where the common law prevails, shows that it had no existence as a remedy at the common law.” * * * “When a court has jurisdiction to proceed *in rem*, and does so proceed, its judgments are binding and conclusive on the whole world, and this is so, whether the tribunal be foreign or domestic (*The Mary*, 9 *Crauch’s R.* 126).

“Not so with judgments at common law; they bind only parties and privies.” * * * “If there is an average of fifty counties to each state, and twenty justices of the peace to each county, we should then have in these United States thirty-one thousand courts of admiralty and maritime jurisdiction, to say nothing of the courts of record. These courts proceeding against, and seizing and selling vessels of foreign nations and those of sister states, and although they would have all the powers of courts of admiralty, yet they would, in but few instances, proceed according to the maritime law, which is part of the law of nations, nor according to act of congress (for congress can pass no law regulating proceeding in the state courts); but they would proceed according to the statutes of the several states, and usages that would there prevail, each state having a different system. The effect of this must be, it appears to me, to embroil the United States with foreign nations, and the several states with

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each other, and to produce retaliatory laws and proceedings, and endless conflict, uncertainty and mischief. And this, I repeat, would render nugatory the provisions of the ninth section of the judiciary act of 1789 ; and the power of congress to regulate commerce (and navigation as incident thereto) with foreign nations, and among the several states. If I am right in the views above expressed, there can be no concurrent jurisdiction *in rem*, in admiralty cases between the United States courts and the courts of the several states."

Sixth. The Moses Taylor is a steamship navigating the high seas, owned out of the state of California, and a foreign vessel.

The township justice proceeds against her *in rem* ; not by common law action ; the judgment is against the ship—no execution can issue by virtue of this judgment against any person, or the property of any person ; the vessel alone must be sold to satisfy the decree of the township justice.

He claims to have admiralty jurisdiction, and to proceed by admiralty forms ; and the courts of California decide that he has all admiralty jurisdiction, and should proceed according to admiralty forms (5 Cal. 272).

It is now for the first time discovered that the judiciary act of 1789 is a nullity ; that the decisions of this court, so ancient, numerous and uniform, are all erroneous ; that a township justice has all admiralty jurisdiction ; that California, but lately a conquered, purchased province of the United States, may, by virtue of her " original sovereignty," set aside the statutes and the laws of the union, and confer admiralty powers upon a village justice.

It is high time that these absurd, disloyal and dangerous pretensions receive their just rebuke.

VAN ARMAN, LANE & HOWE, *attorneys for defendant in error.*

Mr. Justice FIELD delivered the opinion of the court. This case arises upon certain provisions of a statute of California regulating proceedings in civil cases in the courts of

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that state (*Laws of California of 1851, p. 51*). The sixth chapter of the statute relates to actions against steamers, vessels and boats, and provides that they shall be liable—1st. For services rendered on board of them, at the request of, or on contract with their respective owners, agents, masters or consignees; 2d. For supplies furnished for their use upon the like request; 3d. For materials furnished in their construction, repair or equipment; 4th. For their wharfage and anchorage within the state; 5th. For non-performance or mal-performance of any contract for the transportation of persons or property, made by their respective owners, agents, masters or consignees; 6th. For injuries committed by them to persons or property; and declares that these several causes of action shall constitute liens upon the steamers, vessels and boats, for one year after the causes of action shall have accrued, and have priority in the order enumerated, and preference over all other demands. The statute also provides, that actions for demands arising upon any of these grounds, may be brought directly against the steamers, vessels or boats, by name; that process may be served on the master, mate or any person having charge of the same; that they may be attached as security for the satisfaction of any judgment which may be recovered; and that if the attachment be not discharged, and a judgment be recovered by the plaintiff, they may be sold, with their tackle, apparel and furniture, or such interest therein as may be necessary, and the proceeds applied to the payment of the judgment.

These provisions, with the exception of the clause designating the order of priority in the liens, and their preference over other demands, were enacted in 1851; that clause was inserted by an amendment in 1860.

In 1863, the steamship Moses Taylor, a vessel of over one thousand tons burthen, was owned by Marshall O. Roberts, of the city of New York, and was employed by him in navigating the Pacific ocean, and in carrying passengers and freight between Panama and San Francisco. In October of that year, the plaintiff in the court below, the defendant in

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error in this court, entered into a contract with Roberts, as owner of this steamship, by which, in consideration of one hundred dollars, Roberts agreed to transport him from New York to San Francisco, as a steerage passenger, with reasonable dispatch, and to furnish him with proper and necessary food, water and berths or other conveniences for lodging, on the voyage. The contract, as set forth in the complaint, does not in terms provide for transportation on any portion of the voyage by the Moses Taylor, but the case was tried upon the supposition that such was the fact, and we shall, therefore, treat the contract as if it specified a transportation by that steamer on the Pacific, for the distance between Panama and San Francisco. For alleged breach of this contract the present action was brought, under the statute mentioned, in a court of a justice of the peace, held within the city of San Francisco. Courts held by justices of the peace, were at that time by another statute, invested with jurisdiction of these cases, where the amount claimed did not exceed two hundred dollars, except where the action was brought to recover seamen's wages for a voyage performed in whole or in part, without the waters of the state (*Laws of California of 1853, p. 287, and of 1856, p. 133*).

The agent for the Moses Taylor appeared to the action, and denied the jurisdiction of the court, insisting that the cause of action was one over which the courts of admiralty had exclusive jurisdiction, and also traversed the several matters alleged as breaches of the contract.

The justice of the peace overruled the objection to his jurisdiction, and gave judgment for the amount claimed. On appeal to the county court, the action was tried *de novo* upon the same pleadings, but in all respects as if originally commenced in that court. The want of jurisdiction there, and the exclusive cognizance of such causes of action by the courts of admiralty, were again urged, and were again overruled, and a similar judgment to that of the justice of the peace was rendered. The amount of the judgment was too small to enable the owner of the steamer to take the case by

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appeal to the supreme court of the state. That court has no appellate jurisdiction in cases where the demand in dispute, exclusive of interest, is under three hundred dollars, unless it involve the legality of a tax, impost, assessment, toll or municipal fine (*Constitution of the State, art. 6, § 4, as amended in 1862*). The decision of the county court was the decision of the highest court in the state which had jurisdiction of the matter in controversy. From that court, therefore, the case is brought here by writ of error.

The case presented is clearly one within the admiralty and maritime jurisdiction of the federal courts. The contract for the transportation of the plaintiff was a maritime contract. As stated in the complaint, it related exclusively to a service to be performed on the high seas, and pertained solely to the business of commerce and navigation. There is no distinction in principle between a contract of this character and a contract for the transportation of merchandize. The same liability attaches upon their execution, both to the owner and the ship. The passage money in the one case, is equivalent to the freight money in the other. A breach of either contract is the appropriate subject of admiralty jurisdiction.

The action against the steamer by name, authorized by the statute of California, is a proceeding in the nature and with the incidents of a suit in admiralty. The distinguishing and characteristic feature of such suit is, that the vessel or thing proceeded against itself, is seized and impleaded as the defendant, and is judged and sentenced accordingly. It is this dominion of the suit in admiralty over the vessel or thing itself, which gives to the title made under its decrees validity against all the world. By the common law process, whether of *mesne* attachment or execution, property is reached only through a personal defendant, and then only to the extent of his title. Under a sale, therefore, upon a judgment in a common law proceeding, the title acquired can never be better than that possessed by the personal defendant. It is his title, and not the property itself, which is sold.

The statute of California, to the extent in which it autho-

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rizes actions *in rem* against vessels for causes of action cognizable in the admiralty, invests her courts with admiralty jurisdiction, and so the supreme court of that state has decided in several cases. In *Averill* agt. *The Steamer Hartford* (2 Cal. 308), the court thus held, and added that "the proceedings in such actions must be governed by the principles and forms of admiralty courts, except where otherwise controlled or directed by the act."

This jurisdiction of the courts of California, was asserted and is maintained upon the assumed ground that the cognizance by the federal courts "of civil causes of admiralty and maritime jurisdiction," is not exclusive, as declared by the ninth section of the judiciary act of 1789.

The question presented for our determination, is, therefore, whether such cognizance by the federal courts is exclusive, and this depends either upon the constitutional grant of judicial power, or the validity of the provision of the ninth section of the act of congress.

The constitution declares that the judicial power of the United States "shall extend to all cases of law and equity arising under this constitution, the laws of the United States, and treaties made or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state or the citizens thereof, and foreign states, citizens or subjects" (*Art. 2, § 2*).

How far this judicial power is exclusive, or may, by the legislation of congress, be made exclusive in the courts of the United States, has been much discussed, though there has been no direct adjudication upon the point. In the opinion delivered in the case of *Martin* agt. *Hunter's Lessee* (1 Wheat. 334), Mr. Justice STORY comments upon the fact that there are two classes of cases enumerated in the clause

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cited, between which a distinction is drawn ; that the first class includes cases arising under the constitution, laws and treaties of the United States ; cases affecting ambassadors, other public ministers and consuls, and cases of admiralty and maritime jurisdiction ; and that with reference to this class, the expression is, that the judicial power shall extend to *all cases* ; but that in the subsequent part of the clause, which embraces all the other cases of national cognizance, and forms the second class, the word "all" is dropped. And the learned justice appears to have thought the variation in the language the result of some determinate reason, and suggests that with respect to the first class, it may have been the intention of the framers of the constitution, imperatively to extend the judicial power either in an original or appellate form to all cases ; and with respect to the latter class, to leave it to congress to qualify the jurisdiction in such manner as public policy might dictate. Many cogent reasons, and various considerations of public policy, are stated in support of this suggestion. The vital importance of all the cases enumerated in the first class, to the national sovereignty, is mentioned as a reason which may have warranted the distinction, and which would seem to require that they should be vested exclusively in the national courts—a consideration which does not apply, at least with equal force, to cases of the second class. Without, however, placing implicit reliance upon the distinction stated, the learned justice observes in conclusion, that it is manifest that the judicial power of the United States is in some cases unavoidably exclusive of all state authority, and that in all others it may be made so at the election of congress. We agree fully with this conclusion. The legislation of congress has proceeded upon this supposition. The judiciary act of 1789, in its distribution of jurisdiction to the several federal courts, recognizes and is framed upon the theory that in all cases to which the judicial power of the United States extends, congress may rightfully vest exclusive jurisdiction in the federal courts. It declares that in some cases, from their commencement, such jurisdiction shall be exclusive ; in other cases, it

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determines at what stage of procedure such jurisdiction shall attach, and how long and how far, concurrent jurisdiction of the state courts shall be permitted. Thus, cases in which the United States are parties, civil causes of admiralty and maritime jurisdiction, and cases against consuls and vice-consuls, except for certain offences, are placed from their commencement exclusively under the cognizance of the federal courts.

On the other hand, some cases in which an alien or a citizen of another state is made a party, may be brought either in a federal or a state court, at the option of the plaintiff, and if brought in the state court, may be prosecuted until the appearance of the defendant, and then at his option, may be suffered to remain there, or may be transferred to the jurisdiction of the federal courts.

Other cases, not included under these heads, but involving questions under the constitution, laws, treaties or authority of the United States, are only drawn within the control of the federal courts upon appeal or writ of error, after final judgment.

By subsequent legislation of congress, and particularly by the legislation of the last four years, many of the cases which by the judiciary act could only come under the cognizance of the federal courts, after final judgment in the state courts, may be withdrawn from the concurrent jurisdiction of the latter courts at earlier stages, upon the application of the defendant.

The constitutionality of these provisions cannot be seriously questioned, and is of frequent recognition by both state and federal courts.

The cognizance of civil causes of admiralty and maritime jurisdiction, vested in the district courts by the ninth section of the judiciary act, may be supported upon like considerations. It has been made exclusive by congress, and that is sufficient, even if we should admit that in the absence of its legislation the state courts might have taken cognizance of these causes. But there are many weighty reasons why it was so declared. "The admiralty jurisdiction," says

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Mr. Justice STORY, "naturally connects itself on the one hand with our diplomatic relations, and the duties to foreign nations and their subjects ; and on the other hand, with the great interests of navigation and commerce, foreign and domestic. There is, then, a peculiar wisdom in giving to the national government a jurisdiction of this sort which cannot be yielded, except for the general good, and which multiplies the securities for the public peace abroad, and gives to commerce and navigation the most encouraging support at home" (*Com.* § 1672).

The case before us is not within the saving clause of the ninth section. That clause only saves to suitors "the right of a common law remedy, where the common law is competent to give it." It is not a remedy in the common law courts which is saved, but a common law remedy. A proceeding *in rem* is not a remedy afforded by the common law ; it is a proceeding under the civil law. When used in the common law courts, it is given by statute.

It follows from the views expressed, that the judgment of the county court must be reversed and the cause remanded, with directions to dismiss the action for want of jurisdiction.

And it is so ordered.



NEW YORK SUPERIOR COURT.

PURVES agt. MOLTZ.

Where goods come rightfully into the defendant's possession, as a mere bailee in good faith, and they are subsequently wrongfully *detained*, it is necessary to allege a *demand for their delivery*, in an action for their *wrongful detention*.

Where goods come to the possession of a defendant by a mistake, of which he is aware at the time, and he subsequently, through voluntary repairs upon the same, claims a lien thereon, for which he detains the same, he is a wrong-doer from the beginning. Consequently, he is liable in an action for the wrongful *taking and detention*, and no *demand* for delivery is necessary to be alleged.

Special Term, April, 1867.

MOTION by defendant for a new trial.

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ALEXANDER H. REAVY, *for defendant and the motion.*

Defendant refers to *Randall* agt. *Cook* (17 *Wend.* 53). If the original *taking* was lawful, the action must be in the *detinet*. One who having a possession *originally* lawful, merely refused to deliver, is not liable in replevin in the *cepit* (*Hyman* agt. *Cook*, *How. Ap. Cases*, 419).

In an action for chattels, a demand before suit is necessary, where the chattels were lawfully in defendant's possession (*N. Y. Car Oil Co.* agt. *Richmond*, 6 *Bosw.* 213).

No one can be subjected to an action concerning personal property which he has acquired without any wrong on his own part, without a previous demand by the owner (*Stevens* agt. *Hyde*, 32 *Barb.* 171).

The *place* of taking has always been held material, and necessary to be stated with certainty. (*Gardner* agt. *Humphrey*, 10 *Johns.* 53 ; 11 *Id.* 33.)

In an action to recover possession of personal property, where the property which is the subject of the action came to the possession of the defendant by delivery from the wrong-doer, and defendant detains it, it is necessary for plaintiff to allege that defendant has refused to deliver it up upon a demand (*Fuller* agt. *Lewis*, 3 *Abb.* 384).

MR. HART and MR. BOYCE, *for plaintiff, opposed.*

ROBERTSON, Ch. J. The action in this case is for goods wrongfully taken and detained. The complaint alleges them to have been so taken, without any demand for their delivery, which would be necessary to show a right of action. In case the goods came rightfully into the defendant's possession, and they were subsequently wrongfully detained (*N. Y. C. Oil Co.* agt. *Richmond*, 6 *Bosw.* 213), such demand was necessary to be alleged in an action for mere wrongful detention, where the original possession was lawful, and a demurrer would lie for want of it.

In this case the evidence showed that the machine sued for was delivered to the defendant by a blunder ; that he did

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nothing when he received such machine to correct such mistake, but rather lent himself to favoring it. He never had any communication with any one respecting it before ; had no reason to believe that it was intended for him, yet received it into his possession without authority from the owner, and having good reason to believe from the statement of the express driver, that it was not intended for him. If he had done nothing more than become a mere bailee in good faith, he probably would not have been liable to an action for wrongful taking. But forthwith, after receiving it, he commenced to make repairs upon it, without any request or direction from any one—no such purpose having been stated by the party leaving it. Having made such repairs wrongfully, he claimed a lien on the machine for their value, which of course made his detention wrongful. Such conduct may be made to relate back to the original receipt of it, so as to throw light upon the motive for taking and keeping it. If he took it, knowing of the mistake, and intending to get a job, and compel the owner to pay for it, or retain possession until he did, he did not receive it for a legitimate purpose with the plaintiff's assent, and was a wrong-doer from the beginning. He knew the expressman had no authority to deliver it to him, and if he sought to take advantage of his neglect or mistake, he was not an innocent bailee. Larceny may be established by the evidence which the subsequent conduct of a party affords of the purpose of the original taking, although the article may be voluntarily delivered.

I see no reason why a tort may not also be established by the same means. If the defendant had instantly demolished the machine, there would have been no doubt as to the character of the original taking. I cannot perceive any difference in principle between that cause and this.

The verdict of the jury, is, therefore, conclusive, and the new trial must be denied, with \$10 costs.

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SUPREME COURT.

THE NEW YORK AND HARLEM RAILROAD COMPANY agt. THE
FORTY-SECOND STREET AND GRAND STREET FERRY RAILROAD
COMPANY, AND OTHERS.

A *railroad franchise* may be conferred upon a *corporation*. It follows that the legislature can *constitutionally* bestow grants of this kind. The constitution contains no prohibition and no restrictions on this power.

There is no constitutional provision that prohibits railroad franchises being conferred upon or exercised by *individuals*, nor does there appear to be any objection to making such rights *assignable*.

No question can now arise as to the power of the legislature to authorize the construction of a railroad upon any of the streets of the city of New York, without any compensation to the corporation, or to the owners of property fronting on the street, and without the *assent* of the corporation, but even in direct opposition to the wishes of the corporation. (*The Case of People agt. Kerr*, 25 *How. p.* 258, *Court of Appeals*, settles this point.)

If a railroad corporation construct their road in the city of New York, under an act of the legislature, *without the assent of the city corporation*, conceding such assent to be necessary, another railroad corporation that claims to be injured by the construction of the former road, cannot take advantage of such want of assent of the city corporation, as they cannot be injuriously affected thereby; and the requirement of such assent is not for its benefit.

The legislature having by the act of 1860, authorized the construction of the defendant's railroad, and having prohibited the city corporation from giving any assent to any company deriving any authority under the general railroad act of 1850, to construct a railroad on the route of the defendant's road, must be considered as having repealed the requirement of such assent for a road on that route.

There is no privilege or right directly granted to the plaintiffs, of the sole and exclusive use of Fourth avenue for a railroad track. With reference to the defendant's road *crossing* plaintiffs' track, it is not such an *infraction* of private property as to call for a preliminary injunction.

General Term, January, 1867.

Before BARNARD, SUTHERLAND and CLERKE, Justices.

THIS is an appeal from the judgment of the special term of this court dissolving an injunction obtained by the plaintiffs against the defendants. The case at special term is reported in 26 *How. Pr. R.*, 68, and is there stated as follows :

The plaintiff, a railroad corporation, has a railroad running through certain streets in the city of New York, and in

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its course passing through Fourth avenue, between Twenty-third and Fourteenth streets.

The defendants are proprietors of a railroad running from Fourth avenue west on Twenty-third street, and from Fourth avenue east on Fourteenth street. The defendants propose and are about to connect their railroads on Twenty-third and Fourteenth streets, by laying connecting tracks on Fourth avenue, between Fourteenth and Twenty-third streets. Both branches of the defendants' road have a double track, and the plaintiff has also a double track, and the defendants propose to lay their track in Fourth avenue—one track on each side of the plaintiff's tracks. This would leave the plaintiff's double track in the centre of the street, and a single track of the defendants on either side. This would also leave twelve feet between the track of defendants and the curb on each side. This proceeding is complained of by the plaintiff as interfering with its use of its own property, in that it will obstruct the easy access to the plaintiff's cars from the sidewalks. The plaintiff also alleges that it cannot allow the defendants to use its (the plaintiff's) tracks, because its tracks are already fully occupied with the plaintiff's own business. The plaintiff also assumes certain exclusive rights to the use of Fourth avenue for a railroad, under its agreement with the city, and claims that no right to lay a track in the street can be granted, unless with the consent of the city, or payment to the city therefor.

The defendants had commenced laying their track when the plaintiff commenced this action to restrain their so doing, and obtained a preliminary injunction. This injunction the defendants now move to dissolve.

HORACE F. CLARK, *for appellants.*

I. The New York and Harlem Railroad Company having laid their tracks through the Fourth avenue, in pursuance of their charters, and with the permission of the municipality of New York, are clearly entitled to have the use and enjoy-

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ment of their railroad protected against any invasion or interference not authorized by law.

II. The railroad being constructed by defendants, materially interferes with the enjoyment by the plaintiffs of their railroad, by running parallel with it, in such close proximity as to prevent passengers from entering and leaving the plaintiffs' cars with safety, and also by intersecting and crossing the plaintiffs' track at Fourteenth street and at Twenty-third street. (*See Supplemental Complaint, fols. 33 to 37; Affidavit of Barton, fol. 67; Affidavit of Burchill, fol. 72.*)

III. The burden is upon the defendants of showing their legal authority to commit the invasions complained of, and they have failed to show such authority.

1. It is admitted by the answer that the construction complained of, is being made by the Forty-second Street and Grand Street Ferry Railroad Company (*Answer, fol. 30.*)

2. It is also admitted that such company is a corporation, created and organized under the general railroad act, passed April 2d, 1850.

3. By the 5th subdivision of section 28 of that act, it is provided that nothing in the act contained shall be construed to authorize the construction of any railroad not already located in, upon or across any street in any city, without the assent of the corporation of such city, and such assent has not been obtained. (*Sup. Com. fol. 31; Affidavit of Mayor Opdyke, fol. 74, p. 19.*)

4. And by the fourth section of the act of April 17, 1860, set up in the answer, the mayor and corporation of New York, are prohibited from giving any assent to any company organized under the railroad act of 1850, to construct any railroad upon the avenue in question.

Hence the defendants, the corporation, lacking the corporate power to construct the railroad in question, are acting without authority of law.

IV. But the Forty-second Street and Grand Street Ferry Railroad Company, claim that they are the assignees of the franchises alleged to have been granted to Conover and his associates, by the act of April 17, 1860, and that such alleged

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assignment has conferred upon that company the power to construct the railroad in question.

V. Such alleged assignment, if made, has not conferred upon them the powers claimed.

There is nothing contained in the act of April 17, 1860, which can give to an assignment from the grantees named in that act, the legal effect of conferring upon a railroad company, organized under the act of 1850, a corporate power, not only not conferred, but expressly withheld from it by its organic law.

Every corporation created under the general railroad law of 1850, lacks the corporate capacity to take or use a grant of the right to construct a city railroad not located prior to the passage of that act, without the consent of the municipality. To give effect to the restriction in the act of 1850, as well as to the power to assign, alleged to be contained in the act of 1860, the latter must be construed to mean that the franchises granted may be exercised by the assigns of the grantees, provided such assigns be persons other than a corporation created under the general railroad act.

Any other construction would render the restriction totally ineffectual, or place it in the power of the grantees to evade it, and would, therefore, violate the well settled rules for expounding statutes.

VI. Assuming for the moment, the validity of the act of April 17, 1860, it is clear that the railroad authorized by that act to be constructed, was designed to be placed in respect of its construction and operation, under municipal control. (*See § 2 of the Act of 1860.*)

VII. It is also clear that the legislature did not intend that other railroad tracks upon the streets or avenues mentioned in the act of April 17, 1860, should be intersected or crossed, without compensation being made therefor. (*See § 3 of the Act of 1860.*)

In any aspect of the case, the plaintiffs are clearly entitled to an injunction against the crossing of their tracks at Fourteenth street and Twenty-third street, no compensation

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therefor having been made. (§ 3 of *Act of 1860* ; *Supplemental Complaint*, fols. 33, 56, 57.)

VIII. The act of April 17, 1860, is unconstitutional and void.

The decision of the court of appeals, in the case of *The People agt. Kerr*, is relied upon as establishing the validity of these acts of 1860.

The only point decided in that case is, that the private lot owners and the corporation of New York, as the proprietors of the fee of the streets, are not entitled to compensation for the use of a street for a city railway under a legislative grant.

No question was raised as to the invalidity of a grant, for the causes for which it is now assailed. Nor did the case present the question as to the right of municipal control.

This act of April 17, 1860, purports to confer upon Conover and his associates, a perpetual and irrevocable franchise, with the power of eminent domain, and to authorize them to select other persons by whom that franchise may be enjoyed, and that power may be exercised, free from legislative control.

This is an attempted delegation of the sovereign power of the state to private individuals, for private uses, and is violative of our scheme of state government, which vests the legislative power of the state in the senate and the assembly, and authorizes its delegation in no instance save to boards of supervisors, for purposes of local administration (*Cons. of 1846*, *Art. 3*, §§ 1 and 17).

Admitting that the legislature may intrust the power of eminent domain to individuals, to be exercised for the public good, it is denied that they can delegate to individuals the power of selecting others by whom these great powers are to be exercised.

The framers of the constitution of 1846, provided a scheme for the bestowal of charters by general and special acts, to be at all times subject to alteration or repeal (*Art. 8*, § 1).

This legislation of 1860 is utterly subversive of that

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scheme, and is, therefore, violative of the constitutional rights of the people.

IX. The actual passage of the act of April 17, 1860, is put in issue by the complaint. The fact is established, that after the governor's veto of the bill, it received the assent of two-thirds of the members present. The question is, whether the enactment is valid, unless the bill received the votes of two-thirds of the members elected.

X. The city of New York, under her ancient charters, has the right to order and regulate the use of the streets. Whether this right is superior or subject to legislative control, if an open question, need not be considered; for the general railroad act of 1850, as well as the act of 1860, subject the railroad in question to municipal control.

XI. The act of April 17, 1860, is unconstitutional, so far as it invades the rights of property of the New York and Harlem Railroad Company, without providing just compensation.

The property of railroad companies existing under state charters, is not beyond the pale of constitutional protection.

The power reserved to repeal, alter or modify the charters of such company, is not a license to take their property without compensation.

XII. The preliminary injunction had been violated, before the hearing of the defendants' motion to dissolve. The evidence of that violation was before the court, and proceedings for the contempt had been instituted, and the contempt had not been purged when the motion to dissolve was heard.

The defendants were, therefore, not entitled to a hearing upon their motion to dissolve.

XIII. The injunction should be reinstated till the hearing.

MOSES ELY *and*

HAMILTON W. ROBINSON, *for respondents.*

I. None of the charters or acts relating to the plaintiffs' road, confer upon them any exclusive privilege of running a railroad on Fourth avenue, nor are they, by virtue of their

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enjoyment of the corporate franchise right to run such road, possessed of any private property in the street, on account of which they can claim compensation for any consequential damages they may sustain from the creation, location and running, in accordance with legislative authority, of another road which may incommode them, and divert and injure their business.

All questions of the expediency and public necessity of the act, and of the extent of powers to be conferred, or to which they shall interfere with prior grants (not secured as exclusive by legislative contract) of a similar character, rest entirely in the discretion of the legislature. (*Charles River Bridge Co. agt. Warren Bridge Co.* 11 Peters, 420; *Mohawk Bridge Co. agt. The Utica and Schenectady Railroad Co.* 6 Paige, 564; *Westchester Railroad Co. agt. Harlem, &c. Railroad Co.* reported in *N. Y. Transcript*, July 23d, 1863; *Matter of Hamilton Avenue*, 14 Barb. 405; *Thompson agt. N. Y. and Harlem R. R. Co.* 3 Sandf. Ch. 625; *Auburn and Cato Plank Road Co. agt. Douglass*, 5 Seld. 444; 3 Kent's Com. 9th ed. note to p. 459; 2 Green. Cruise, 56, part 3d, title Franchise, § 29; *Albany Northern R. R. Co. agt. Brownell*, 24 N. Y. 345.)

II. Whatever might have been the rights conferred under a continuing charter, exempt from legislative interference, that which the plaintiffs accepted, granted their corporate rights and franchises, including their entire right to maintain and operate their railroad, subject to the express right and power of the legislature to alter, modify and repeal all those privileges. (*Sess. Laws*, 1831, p. 323; *Id.* 1835, p. 87; *Id.* 1859, p. 914.)

Their very existence, including all corporate powers and franchises, have always been held on sufferance, while the defendants are the absolute donees of all the rights and privileges conferred by the act of 1860 (*Chap. 515, Sess. L. 1860*, p. 1050.)

Whatever rights the plaintiffs may have possessed by legislative authority, to operate a railroad in the Fourth avenue, between Fourteenth and Twenty-third streets, or to do any

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act inconsistent with the exercise of the full powers and privileges granted by the first section of chapter 515 of the laws of 1860, they were *pro tanto*, repealed by section five of that act, which is the later expression of the will and intent of the legislature.

Instead of the rights and powers thereby conferred on the defendants, being in any respect subordinate to those of the plaintiffs, the contrary is the case, as to all their corporate powers and franchises, that can be exercised in the conveyance of passengers, within the space between Fourteenth and Twenty-third streets, or elsewhere. And instead of the plaintiffs' being entitled to any injunction against the defendants' exercise of the powers specified in the statute, the plaintiffs' convenience must yield, so as to enable the defendants to exercise their paramount rights and privileges as conferred by the latter act (*Westchester R. R. Co. agt. Harlem Bridge, &c. R. R. Co. supra*).

III. The plaintiffs possess no independent powers as grantees of the corporation of the city of New York.

The rights of the corporation in the Fourth avenue, obtained under the acts of 1813, are "*publici juris*," and subject to legislative control, and they are without power to confer any rights of property in the street, or to authorize the running of a railroad, or the creation of any franchise. (*Davis agt. The Mayor, &c.* 14 N. Y. 506; *People agt. Kerr, in Court of Appeals*, 25 How. Pr. 258; *Act 1860, chap. 10, Sess. Laws*, p. 16; *Act of 1860, chap. 515, § 4, Sess. Laws*, p. 1050.)

The capacity of the plaintiffs to take or exercise any such rights, is limited by their charter (1 R. S. 600, § 3).

IV. The grant to the defendants of the right of constructing and operating their railroad, as authorized by the act of 1860 (*chap. 515*), has received a judicial construction and confirmation of its constitutionality, in the case of *The People agt. Kerr (supra)*, relating to a similar grant contained in chapter 513, of the laws of 1860, and their right to run upon and use the streets and avenues, the title to which is in the corporation (as is the Fourth avenue), is affirmed.

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V. It is wholly immaterial whether the defendants are to be regarded as a corporation or a joint stock association, as the right to lay, construct and operate the road, is given the grantees and their assigns (see act), and the right of eminent domain delegated to them, may be exercised, as is well established, either by a corporation or private individuals. (*Bloodgood* agt. *Mohawk and Hudson R. R. Co.* 18 *Wend.* 9 ; See resolution of Court of Errors, p. 75 ; Opinion of Judge EMOTT in *People* agt. *Kerr, Mss.* ; *Bank of Middlebury* agt. *Edgerton*, 30 *Vt.* 182.)

The unauthorized exercise of corporate powers is the usurpation of a franchise, and the attorney general alone can interfere, and that by *quo warranto*. (*Code*, § 432 ; *The People, &c.* agt. *Tibbits, &c.* 4 *Cowen*, 368.)

VI. The case shows that the defendants, instead of imitating the selfish and pretentious conduct of the plaintiffs, have consulted their wishes, in omitting to run upon, intersect and use this portion of the railroad track, as authorized by section three, of chapter 515 of the laws of 1860 ; that compensation which was conceded to be liberal, was offered by them for such privilege and declined, and they have adopted the other alternative of laying another track on the most approved plan, and using the utmost care to do no unnecessary injury to or destruction of the privileges enjoyed by the plaintiffs.

The objection taken is not to the mode in which defendants exercise their right, but to its being exercised at all. No objection can be urged to the mode proposed, that is not fatal to the right.

VII. The charge of contempt made against the defendants was no answer to the motion, which was a matter of right. (*Smith* agt. *Reno*, 6 *How. Pr.* 124 ; *Field* agt. *Hunt*, 22 *Id.* 330.)

VIII. The right of the defendants to lay their railroad track on the Fourth avenue, between Fourteenth and Twenty-third streets, alongside of that of the plaintiffs, in the manner they propose, is clear as against any of the pretensions

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of the complaint, and the order dissolving injunction ought to be affirmed, with costs.

Additional points for defendants :

I. The complaint states no case upon which an injunction against the defendants, restraining them from crossing the railroad track of the plaintiffs should be granted.

1. The case stated is not of any attempt to cross the plaintiffs' tracks without compensation. It alleges no damage from that act, for which compensation ought to be made. The matter for which claim is made is *damnum absque injuria*. No injunction is prayed for until such compensation is made, but an entire and absolute prohibition of defendants' road is claimed on other grounds, which repudiate the defendants' right, and this was the injunction asked.

2. The act of April 17th, 1860, chapter 515, requires no compensation to be made for merely crossing the plaintiffs' track. It is for "running upon, intersecting or using," that the act of 1860, page 1051, section 3, awards compensation. There is a distinction, which is observed in the statutes, between "crossing" and "intersecting."

The general railroad act of 1850, section 28, subdivision 6, authorizes the "crossing, intersecting, joining and uniting."

For purposes of intersection, it requires parties to unite with the owners of the new railroad, in the intersection and connections, and to grant the proper facilities.

For intersection, compensation is to be made under both statutes, but not for "crossing."

Intersecting is rather synonymous with "joining and uniting," and contemplates some such union of the two roads, by which the cars of one may, to some extent, be run on the track of the other.

The plaintiffs' chartered rights being subject to "alteration, modification and repeal," by the legislature, they had no right of property in the Fourth avenue, over which their railroad tracks are laid.

These being laid in a public highway, in or over which the plaintiffs had only an easement and right of way, no

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property of theirs is taken, and they sustained no injury for which they are entitled to any compensation by the mere crossing of their track by the defendants.

(a) The plaintiffs allege no damage or inconvenience for which compensation should be made, as likely to result from the mere crossing of their railroad tracks in the mode contemplated.

The answer (*fol.* 36) and affidavits (*fol.* 59, 60), expressly deny that any such damage would ensue. This was uncontradicted.

(b) The mere crossing of the track of one railroad laid in a public highway by the track of the other, without substantial injury to the track first laid, constitutes no ground for an injunction. (*Brooklyn and Jamaica R. R. Co. agt. The Brooklyn Central R. R.* 33 Barb. 420; *Tuckahoe C. Co. agt. Tuckahoe R. R. Co.* 11 Leigh [Va.], 42; *Albany Northern R. R. Co. agt. Brownell*, 24 N. Y. 345; Judge INGRAHAM'S *Mss. opinion in The Sixth Avenue R. R. Co. agt. Kerr and others.*)

(c) The compensation that is to be made by section 3, of the act of 1860, chapter 515, is only required to be paid in advance if it is for "property taken," in which there is an absolute ownership.

In such a case this statute insures such compensation (*Bloodgood agt. The Mohawk and Hudson R. R. Co.* 18 Wend. 9).

But if it is a mere requirement as compensation for disturbance in a privilege enjoyed through public favor, which the legislature might have revoked, the statute merely creates a right of action for the pecuniary consideration. Its prepayment is not necessary as a condition precedent. (See Judge INGRAHAM'S *opinion, supra.*)

(d) No case of unauthorized or noxious nuisance, or of irreparable mischief or of insolvency, is stated or pretended as grounds for a preliminary injunction. (*Mohawk Bridge Co. agt. Utica and Schenectady R. R. Co.* 6 Paige, 554; *Hodgkinson agt. Long Island R. R. Co.* 4 Ed. Ch. 411; *Wiggins*

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agt. *Mayor, &c. of N. Y.* 9 *Paige*, 16 ; *Marshall* agt. *Peters*, 12 *How. Pr.* 218.)

For any injury resulting from crossing their tracks, the plaintiffs have ample remedy at law.

(e) But even if any damages were assessable, the matter is so trivial, and the effect of an injunction so disastrous, that the court will refuse an injunction, or at most, require security to be given for ascertaining and paying any damages that may be awarded (*Jones* agt. *Great Western R. R. Co.* 1 *R. W. C.* 684).

II. The objection that the defendants, "The Forty-second street and Grand street Ferry Railroad Company," being a corporation formed under the general railroad law of 1850, cannot, under the assignment of the grant made by the act, chapter 515 of the laws of 1860, complete and operate the railroad specified in their charter and in that grant, because they had not obtained the consent of the corporation of the city of New York, is untenable.

1. The act of April 2, 1850, is an enabling statute, for the creation of corporations for the general purposes specified in the first section.

By section 28, subdivision 3 (after authorizing the construction of railroads through streets and highways), it was provided that nothing in the act should be construed "to authorize the construction of any railroad not already located in, upon or across any streets in any city, without the assent of the corporation of such city."

By the act of 1854, chapter 140, section 1, where the railroad commenced and ended in the city, it was further required that the consent of a majority in interest of the owners of the property upon the streets, should be first had and obtained.

But by the act relative to railroads in the city of New York, passed January 30, 1860, chapter 10 (*Laws of 1860*, p. 16), it was provided that it should not be lawful thereafter to lay, construct or operate any railroad in, upon or along any of the streets or avenues of the city of New York, wherever such railroad commenced or ended, except under

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the authority and subject to the regulations and restrictions which the legislature might thereafter grant and provide, and all inconsistent acts were repealed.

So far, therefore, as the consent of the corporation of the city of New York, to the construction of any railroad in, upon or over the streets or avenues of the city was concerned, their power over the subject was entirely revoked, and no railroad could thereafter be laid, constructed or operated, except under the authority of the legislature, and subject to the regulations and restrictions they might thereafter grant and provide.

The legislature, by their several acts of 1854, chapter 140, and of 1860, chapter 10, could only have had reference to railroads attempted to be constructed by corporations deriving their authority to construct and operate their road under the general railroad act.

It could not have had reference to any railroad incorporations, which might thereafter be authorized under a special law emanating from the same authority, which would contain its own provisions and restrictions. The rights of existing railroad companies were protected by the exception.

Nor to any attempted action of the corporation authorizing the construction of any railroad in then streets or avenues of the city, as they had no such power. It could only have been intended to affect and guard against corporations formed or to be formed under some general law, such as the general railroad act, and restrain them in these particulars. None of the numerous railroads beginning and ending in cities, had been incorporated by any special act.

The limitation (contained in section 28, subdivision 5), upon the authority conferred by the general railroad act, so far as it required any assent of the corporation of the city of New York, to the construction of any railroad in that city, was entirely removed by the act of 1860, chapter 10, and since then no such assent is in any case either necessary or of any avail.

2. So far as this railroad is concerned, it is expressly authorized. The railroad of the defendants now being oper-

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ated upon the route specified in the act of 1860, chapter 515, has been constructed under that legislative authority, and it is made the duty of the corporation to promote its construction and protect its operation. The supplementary "regulations" rendered necessary by chapter 10, of the laws of 1860, to carry into effect the powers of a corporation under the general railroad act, to construct and operate a railroad through the streets and avenues of the city of New York, have been supplied by this act.

III. The act of 1860, chapter 515, rendered the grant assignable.

The parties designated as "assigns," are not limited to private persons.

The term fairly included a railroad corporation having powers of a like character.

Corporations to the extent of their powers, come within the meaning of "persons."

The corporate powers of the defendants, "The Forty-second street and Grand street Ferry Railroad Company," were these precise powers.

There is no incongruity in the arrangement by which the grantees parted with their interests to that railroad company, and it became the assignee of a railroad authorized by law, independent of control by the corporation, except by ordinance.

The paramount object contemplated by the legislature, that this railroad should be constructed and operated for the public good, has been accomplished, and that too, through the agency of the very grantees named in the act, and their assigns.

IV. The only supervision allowed by the act of 1860, to the corporation of the city of New York, is through such reasonable rules and regulations in respect thereto, as the common council may, from time to time, by ordinance prescribe. No such ordinance has been passed.

V. The rights of the city of New York in the streets and avenues thorough which this railroad runs, are only such as are conferred by the laws of 1813, and are *publici juris*. No

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compensation is necessary to be made to them (*The People agt. Kerr*, 25 *How*. 258).

Even if this were otherwise, the plaintiffs cannot urge that objection, or claim any right to represent the interest of the corporation.

VI. There was nothing inconsistent with any constitutional prohibition, in making the grant assignable.

Nearly every act relating to ferries, in the statute books of the state, makes such interest assignable. So, also, do various laws conferring franchises of a like character in wharves, turnpikes, dams, &c (*Bank of Middlebury agt. Edgerton*, 30 *Vt.* 182).

Such interests may be made assignable by express statute.

The authority vested in the "grantees and their assigns," to acquire the right to run upon, intersect or use, part of any other railroad track, requires that the proceedings for that purpose should be taken by the parties in interest.

The object of the statute is, to render the actors at all times definite and certain.

The power of the legislature to delegate that authority to private persons, is well settled (*Bloodgood agt. Mohawk and Hudson R. R. Co.* 18 *Wend.* 9).

There is nothing in the language or spirit of the constitution which prohibits this mode of designating the parties who are to initiate the proceedings (*Buffalo and N. Y. R. R. Co. agt. Brainard*, 5 *Seld.* 110).

The authority of the legislature, where not restrained by the constitution, is paramount as to all matters within the scope of civil government, and such restrictions upon this power, resting in mere implication, can only exist in some strong reason of necessity.

By the court, BARNARD, J. All the questions in this case are capable of being resolved into the following :

Whether the legislature had authority to pass this act of April, 1860? In this connection it is contended it had not, because it would tend to impair the previous franchise granted to the plaintiffs, and because a franchise of the char-

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acter granted by the act of April 17, 1860, can only be granted to a corporation for a specified period, and cannot be made assignable; and that as the general railroad act provides for the incorporation for railroad purposes, there is no necessity for special legislation. Whether the defendants being incorporated under the general railroad act, the fifth subdivision of which provides that the act shall not authorize the construction of any railroad on any street in any city, without the consent of the corporation, can they, not having obtained such consent, construct their railroad? And in this connection arises the question, whether the plaintiffs can take advantage of such want of consent, and whether the defendants cannot construct their road under the assignments to them, by the parties named in the act of April 17, 1860, of their rights thereunder?

Whether the defendants' road does not so impair the franchise of plaintiffs, as to come within the constitutional prohibition against taking private property without due compensation?

Whether the defendants should not be enjoined from crossing plaintiffs' road, the damages for such crossing not having been agreed upon or ascertained, in the manner pointed out by law? Whether the construction of defendants' road does not take actual property of plaintiffs without compensation, by reason of two tracks of the two roads running so near to and parallel with each other, as to endanger the safety of the passengers getting in and out, and thereby deterring passengers from riding?

As to the first question, it is not now doubted but that a franchise of this nature may be conferred upon a corporation. That being conceded, it follows that the legislature can constitutionally bestow grants of this kind. The constitution contains no prohibition and no restrictions on this power.

A corporation is but an artificial creation, and may consist of one or more individuals. There is no constitutional provision that prohibits such franchises being conferred upon

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or exercised by individuals, nor does there appear to be any objection to making such rights assignable.

The legislature had the power to grant this franchise ; the expediency and necessity of granting, the propriety of granting it to a corporation, or a set of individuals and their assigns ; the safeguards and restrictions to be placed upon the use ; are all, unless some constitutional inhibition is violated, entirely in the discretion of the legislature. No question can now arise as to the power of the legislature to authorize the construction of a railroad upon any of the streets of New York, without any compensation to the corporation or to the owners of property fronting on the street, and without the assent of the corporation, but even in direct opposition to the wishes of the corporation. That point is settled by the case of *The People agt. Kerr* (25 How. p. 258).

If, by the act of 1860, a corporation is created, it is not objectionable under the clause of the constitution which contains the prohibition ; it being provided that a corporation may be created by a special act, when in the judgment of the legislature, the object of the corporation cannot be obtained under the general law. The passage of the special act is conclusive of its merits, in the judgment of the legislature (*Mosier agt. Hilton*, 15 Barb. cited from page 663).

As to the second question, conceding that defendants have no authority to construct their road without the assent of the corporation, still the plaintiffs do not stand in a position to assert that there is no such assent, or if there be none, to take advantage of the want of it.

The party whose assent is necessary, is the only party who can take advantage of the want, except where the want of it has the effect of making a corporation exceed its corporate powers, in which excepted case the attorney general can alone take proceedings for such usurpation, since the want of such consent works no private injury to the corporation, or to the individual owners of property or taxpayers, under the decision of *The People agt. Kerr*. The stockholders and creditors of defendants do not complain.

The want of consent cannot injuriously affect the plaintiff

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in its franchise or corporate powers. The requirement of the consent was clearly not for its benefit.

The plaintiff then does not stand in a position either to assert that there is no assent, or to take advantage of its non-existence.

But the requirement of the assent of the corporation of the city of New York is, in effect, so far as the defendants are concerned, abrogated. By the act of 1860, page 16, it was in substance provided that all railroads thereafter to be constructed in the city of New York, should be so constructed under the authority, and subject to the regulations and restrictions which the legislature might thereafter provide, and all acts inconsistent therewith repealed.

It is obvious that the legislature could directly repeal the clause requiring the assent of the corporation of the city of New York, and that thereupon, any railroad company organized under the railroad act, whether formed before or after such repeal, would not be affected by the repealed clause.

This act of 1860, renders it necessary for a corporation formed under the general railroad law, for the purpose of a railroad in the city of New York, to obtain the authority of the legislature to construct its road, and the legislature in giving such authority, makes such regulations and restrictions as, in their judgment, are requisite. This abrogates all former laws relative to the actual construction of railroads in the city of New York.

This road in question has been authorized by the legislature, under such regulations and restrictions as were deemed necessary ; and the defendants having obtained the right to construct from those to whom it was granted, can exercise that right. Again, the clause in question is but a prohibition of the legislature against the actual construction of a railroad track in a street.

The legislature having, by the act of 1860, authorized the construction of a railroad track in the streets in question, and having prohibited the mayor, &c., from giving any assent to any company deriving any authority under the general

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ralroad act of 1850, to construct a railroad on the route in question, must be considered as having repealed the requirement of such assent for a road on that route. For it cannot be held, that the legislature means to make it requisite to obtain that which it also says shall not be given.

As the legislature, therefore, have rendered it impossible for defendants to obtain this assent, it is no longer necessary for them to obtain such consent, in order to enable them to use the right which they had obtained by assignment from the individuals named in the act of April 17, 1860.

The defendants now stand in the same position as if the legislature had granted the right to them ; for the legislature granted it to certain persons and their assigns, and the defendants are the assignees.

Another question is, whether defendant's road does not so impair plaintiffs' franchise, as to come within the constitutional provision against taking private property without due compensation. It is only necessary on this point to refer to the case of the *A. and C. P. Railroad Co. agt. Douglass* (5 *Seld.* 461).

There is no privilege or right directly granted to plaintiffs of the sole and exclusive use of the Fourth avenue for a railroad track. With reference to the point raised as to the defendants' road crossing plaintiffs' track, this is not such an infraction of private property as to call for a preliminary injunction (*B. C. and J. R. R. Co. agt. B. C. R. R. Co.* 33 *Barb.* 420).

This crossing became necessary in an authorized use of the streets, the same as the crossing by ordinary carts. It is true, that at the point of crossing, the rail of the track which is crossed will be subject to some damage by wear and tear ; but that is one of the damages which is necessarily incident in laying rails in a street, the concurrent use of which appertains to others.

There may be considerable question whether the statute requires any compensation for the mere crossing of a track. If it does not, none can be had ; if it does, then the statute does not make the fixing and payment of such compensation

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as a condition precedent to the crossing ; and unless there are allegations of insolvency, or some special cause shown, the court should not interfere to restrain the prosecution of a right.

In this case there are no allegations of insolvency, and no special cause shown ; on the contrary, the complaint does not allege any damages arising from such crossing, which need any compensation.

The last point, as to the effect of the ties and tracks being so near as to endanger the lives of the passengers, and so deter persons from riding, is sufficiently answered by the remark of the judge in his opinion at special term.

Order appealed from affirmed, with \$10 costs.

SUTHERLAND, J. I concur in the conclusions to which Judge BARNARD has arrived, and in most of the views or propositions stated in his opinion, but I am not willing to concur in all he says as to the effect or operation of the act of January 30, 1860 (*Laws of 1860, p. 16*). That act prohibits the construction thereafter of any railroad in the city of New York, without the authority of the legislature, but it does not declare, that such roads may be thereafter constructed by the authority of the legislature *alone*, and without the consent of the city ; and had it so declared, it would not have followed that the legislature had power to authorize the construction of such roads without the consent of the city. But the court of appeals in affirming the decision in *The People agt. Kerr*, must have decided, that at least as to the city corporation, the legislature had the constitutional power to authorize the construction and operation of a railroad in the city, without its assent.

Therefore, the grantees named in the act of April 17th, 1860 (*Laws of 1860, p. 1050*), or their assignees, had the right under that act, to construct and operate their road, without the consent of the city, and I am not prepared to hold that this right was surrendered or abandoned, by organizing or undertaking to organize as a corporation, under the general railroad act ; but if otherwise, I concur in the sug-

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gestion of Judge BARNARD, that the plaintiff is not in a position to take advantage of the want of consent on the part of the city.

SUPREME COURT.

JOHN M. BATTERMAN agt. ARCHIBALD FINN.

To make a person who is not a party to the action or named in the *injunction order*, liable for *disobeying such injunction*, on the sole ground that he is an *agent or servant* of the defendant, such person should bear such a relation to the defendant as will enable the latter to control his action in regard to the subject matter of the injunction.

Bona fide lessees of a water power, who are not made parties to the action, are not liable in damages for disobeying an injunction against their lessor, to restrain him, his servants and agents, from an injurious flow of water upon the plaintiff's premises, upon the ground that they act as the servants and agents of the defendant—the lessor.

It is an established rule, with very few exceptions, that a *landlord* is not answerable to third parties for injuries resulting from the wrongful or negligent acts of the *tenant*.

The remedy by injunction is extraordinary, and should only be resorted to where there is a clear right, as there is much greater reason to apprehend that irreparable injury will be produced by its too frequent use, rather than from the too frequent denial of this remedy.

Albany General Term, December, 1864.

Before PECKHAM, MILLER and INGALLS, Justices.

APPEALS from two orders declaring the defendant and others, guilty of contempt for disobeying an injunction issued in the above action.

R. W. PECKHAM, JR., *for appellant.*

C. B. COCHRANE, *for respondent.*

By the court, INGALLS, J. Finn is the only party to the action, and the injunction was directed to him, his attorneys, agents and servants, and served only upon him and Rundle.

The only material question arising upon these appeals is, whether Ruggles, Rundle, Gnessner and Taylor, were the agents or servants of Finn, in the use of the water, and in that capacity wrongfully obstructed the flow thereof, and

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flooded the plaintiff's wheels, thereby rendering themselves and Finn liable to damages for a violation of the injunction. It does not appear that Finn has been guilty of any personal act amounting to a violation of the injunction, but it is claimed that he became liable, as well as his lessees, for their wrongful or negligent acts. In other words, that such lessees were the *agents or servants of Finn*, in such sense as to bring them within the command of the injunction, and thereby render *him liable* for their acts, *and they liable* for a violation of the injunction.

It is not found as a fact, nor is it pretended that the parties were guilty of fraud, collusion or conspiracy, in leasing the premises with a view to evade the injunction; nor does it appear that Finn reserved to himself any control over the premises, or that he covenanted to repair, or to do any other act in reference thereto, during the tenancy.

An injunction only issues against a party to the action. (*Willard's Eq. Jur.* p 342; *Fellows agt. Fellows*, 4 Johns. Ch. R. 25; *Watson agt. Fuller*, 9 How. 425; *Sage agt. Quay*, 1 Clark, 347.)

It is also an established rule, subject to rare exceptions, that a landlord is not answerable to third parties for injuries from the wrongful or negligent act of the tenant (*Cheetham agt. Hampson*, 4 D. & East, 319). Lord KENYON, Ch. J., remarks: "And deplorable, indeed, would be the situation of landlords, if they were liable to be harrassed with actions for *the culpable neglect of their tenants*." (*The Mayor, &c. agt. Corliss*, 2 Sandf. 301; *Bean agt. Ambler*, 9 Penn. R. 193.)

It does not appear that Finn directed, or even advised the other persons to use the water in such manner as to set back the same and flood the plaintiff's wheel; but on the contrary, cautioned them to so use the water as to avoid doing the plaintiff injury. It is not pretended that the structure by which the defendant controlled the water at his mill, was itself a nuisance, but that the wrong consisted in the manner that structure, in itself lawful, was used; hence it cannot be successfully contended that Finn was liable, because he first

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created a nuisance, and suffered others to continue it with his approbation, when he should have abated it. No such state of facts exists in this case. We are unable to discover upon what principle the other persons named, can by possibility be regarded the agents or servants of Finn, or how he can be held responsible for their acts, upon the facts in this case. By the lease, he surrendered the entire control of the water to the lessees, and we must assume it was susceptible of use in such manner as not to prejudice the plaintiff. The conclusion seems irresistible, that Finn is not liable for their acts as his agents or servants, nor were they liable by reason of any such relation.

To make a person who is not a party to the action or named in the injunction order, liable for disobeying such injunction, on the sole ground that he is an agent or servant; the person should bear such a relation to the defendant, as will enable the latter to control the action of the person sought to be charged, in regard to the subject matter as to which the injunction issues; this is but reasonable. The remedy by injunction is extraordinary, and should only be resorted to when there is a clear right, as there is much greater reason to apprehend that irreparable injury will be produced by its too frequent use, rather than from the too frequent denial of this remedy.

To hold the defendant or his lessees liable under such circumstances, would, in my judgment, be giving to such injunction order a too far-reaching effect, and establishing a dangerous precedent (*The People agt. The Albany and Vermont R. R. Co.* 20 How. 358).

It is true that the transfer of property may subject a plaintiff to inconvenience and multiplicity of proceedings to obtain adequate redress, but that consideration will not justify a violation of right, or a departure from well established practice. It is not a serious hardship upon the plaintiff to be compelled to bring before the court as parties to the action, those against whom relief is sought, especially when the remedy by injunction is resorted to.

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We are of opinion that the orders of the special term should be reversed, with costs.

PECKHAM, J., concurred.

MILLER, J., dissented.

ERRATA :

In the case of *Bridenbecker* agt. *Hoard*, *ante*, p. 294, in the sixteen th line from the top, the words "second count," should read "*several counts.*"

On page 298, in the tenth and twenty-second lines from the top, the word "corporators," should read "*copartners.*"

DIGEST
OF THE
POINTS OF PRACTICE,
AND
OTHER IMPORTANT QUESTIONS,

CONTAINED IN THE FOLLOWING REPORTS :

*32 Howard's Pr. R. ; 46 Barbour's R. ; 1 Abbott, N. S. ; and
31 and 34 N. Y. R.*

ACCOUNTING.

1. One who has received the rents and profits of land, not being entitled to them, as against a judgment creditor having an equitable right to the property, for the satisfaction of his debt, and to the rents and profits that they may be so applied, is chargeable, in accounting for the rents and profits, with interest (*Cowing* agt. *Howard*, 46 *Barb.* 579).
2. Where one claiming to own property under a title which had been adjudged void as to the plaintiff, had kept the latter out of possession of his rights for many years, he, in the meantime enjoying the property, receiving a large amount of rents and profits, and using them in his business: *Held*, that he should pay interest. But the defendant was allowed a compensation by way of commission, for receiving the rents and profits, as a trustee, although he was not a voluntary trustee, and the trust was not created by any written instrument. (*MARVIN, J. dissented.*) (*Id.*)
3. Where the plaintiff files his complaint, alleging a partnership, and asking for an accounting by the defendant, if he does not establish the

existence of the partnership, he will not be entitled to the accounting. The mere relation of creditor of the defendant, is not of itself, sufficient to entitle the plaintiff to an accounting (*Saller* agt. *Ham*, 31 *N. Y. R.* 321).

ACTION.

1. Where the sheriff, after arresting defendant, stands as bail for his appearance, and is sued for not producing the body of the defendant, to be taken in execution, he cannot give evidence of the debtor's insolvency in mitigation of damages (*Metcalf* agt. *Stryker*, 31 *N. Y. R.* 255).
2. In an action upon a premium note, it is incumbent upon the plaintiff to give some evidence of the existence of losses which render an assessment proper. Such evidence of loss, and a settlement and allowance of the same, as would conclude the company whilst engaged in its proper business, will be sufficient where the action is by a receiver, &c. So, also, a judgment recovered against the company is a sufficient evidence of loss. It is unnecessary to show the particular loss for the payment of which the assessment is made. It is sufficient if

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it be shown that losses have accrued during the time the defendant's policy was in force, and that defendant's note was assessed to meet them (*Jackson agt. Roberts*, 31 N. Y. R. 304).

3. A complaint, alleging a mistake in fact, in a former accounting, and demanding a new accounting; also, that the mistake be rectified, and that the defendant pay a specific sum; is properly for relief. Where there has been an accounting and settlement, if it afterwards appear that a clear mistake occurred by the omission to include a considerable sum of money, an action will lie to correct such mistake and to collect such sum. (*The case of Coon agt. Knapp*, 4 Seld. 402, and *Kellogg agt. Richards*, 14 Wend. 116, each distinguished, per CAMPBELL, J.) (*McDougall agt. Cooper*, 31 N. Y. R. 498.)

4. False affirmations made by the defendant, with intent to defraud the plaintiff, and by which the plaintiff is damnified, are foundation for an action. To lay the foundation for such action—in the nature of an action on the case for deceit—it is not necessary that the defendant should be benefited by the deceit, or in collusion with the party that is benefited. To sustain this action, it is enough for the jury to find that the plaintiff was moved by the false representations of the defendant, so that without them, he would not have acted in the premises whereby he was damnified, although representations made by others had some influence upon his mind. Where the plaintiff had thus been induced to subscribe to the capital stock of an insolvent bank, and to give his bond and mortgage to secure the payment of his subscription, he had been damnified, although the subscription had not actually been paid. Such bond and mortgage being assigned to, and deposited with the comptroller as security for circulating notes of the bank, the plaintiff would be estopped from denying its validity in his hands. So, likewise, where the bond and mortgage had been sold by the comptroller in the presence of the plaintiff, and without any objection on his part, the plaintiff would be estopped from denying its validity in the hands of such purchaser (*Hubbard agt. Briggs*, 31 N. Y. R. 518).

5. Although the Code has abolished the distinction between actions at law and suits in equity, so far as regards the forms of procedure, still the principles by which the rights of parties

are to be determined remain unchanged (*Peck agt. Newton*, 46 Barb. 173).

See EJECTMENT, 2, 3, 4, 5.

See PRINCIPAL AND AGENT.

See SHERIFF, 3 to 7.

See USURY, 7.

ADJOINING OWNERS.

1. The mere fact of the boughs or limbs of a tree planted upon the land of one man, extending to or overhanging the land of an adjoining owner, does not give the latter any right or title to any part of the tree, or to the overhanging branches, or the fruit growing thereon. The maxim *cujus est solum, ejus est usque ad coelam et ad inferos*, does not and should not apply to cases of overhanging branches of trees, walls or other fixtures. The title to the fixture at the surface of the land, determines that of everything connected with, and which is superincumbent above the surface where the base of the fixture rests (*Hoffman agt. Armstrong*, 46 Barb. 337).

See AGREEMENT, 8.

See ASSAULT AND BATTERY.

ADMIRALTY.

1. The state courts have no jurisdiction of civil causes in admiralty (*The Steamer Moses Taylor agt. Hammons*, ante, 460).

2. Under the constitution of the United States, and the judiciary act of 1789, the United States courts have exclusive cognizance of civil causes of admiralty and maritime jurisdiction (*Id.*).

3. A contract made by a passenger for a passage to California, with the owner of a line of California steamers, by which, in consideration of \$100, the owner agrees to transport the passenger from New York to San Francisco, as a steerage passenger, with reasonable dispatch, and furnish him with proper and necessary food, water and berths, or other conveniences for lodging on the voyage, is a contract of admiralty and maritime jurisdiction; and for a breach of which, the United States courts of admiralty have exclusive jurisdiction (*Id.*).

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ADVERSE POSSESSION.

1. Where different parties claim the same premises under conflicting grants from the same source, each grant being upon condition that the grantee is the true owner of adjacent lands, possession under such grant by the one who was not the true owner of the adjacent lands, cannot be deemed adverse, so as to ripen into a title against the other (*N. Y. Superior Court*, 1863, *Toule* agt. *Palmer*, 1 *Abb. N. S.* 81).

AFFIDAVITS.

1. The statute giving notaries power to certify affidavits, is not to be construed as restricted to affidavits in actions pending (*Supreme Court, Special Term*, 1865, *Mosher* agt. *Heydrich*, 1 *Abb. N. S.* 258).
2. An affidavit, in the commencement of which the deponent is designated by name, is not void for not being subscribed by him (3 *Johns.* 589). (*N. Y. Superior Court*, 1863, *Soule* agt. *Chase*, 1 *Abb. N. S.* 48).
3. The party's subscription to the affidavit, added to his statement for judgment by confession, is a sufficient signing of the statement, within the provision of the Code requiring statements for judgment by confession to be signed (*Supreme Court, Special Term*, 1865, *Mosher* agt. *Heydrich*, 1 *Abb. N. S.* 258).
4. A notary public, in certifying an affidavit, need not add the place of his residence thereto, to show that the venue was within his jurisdiction. The presumption in the case of a notary is the same as in the case of a commissioner or justice—that he acted within his proper jurisdiction (*Supreme Court, Special Term*, 1865, *Mosher* agt. *Heydrich*, 1 *Abb. N. S.* 258).

AFFIRMATIVE.

1. In an application to charge an assignee, not a party to the suit, with costs, the moving party holds the affirmative, and is bound to make out a satisfactory case (*Wolcott* agt. *Holcomb*, 81 *N. Y. R.* 125).

AGREEMENT.

1. An agreement to forbear to sue, is a good consideration for the promise of a third person to pay the debt. Although the law will not infer that any

forbearance was agreed to or intended, merely because a new note was taken for an old debt, yet when the evidence establishes that such an agreement was made, in connection with the making of a note having time to run, it will hold it to be valid and binding (*The Mechanics' and Farmers Bank of Albany* agt. *Wixon*, 46 *Barb.* 218).

2. The defendant, with others, subscribed a paper, agreeing to pay to certain persons named therein as trustees, the sums subscribed, for the purpose of raising a fund sufficiently large to entitle them to an act of incorporation as an academy; \$2,500 being specified as the sum necessary to be subscribed in order to render the subscriptions binding; and the paper contained a request to the trustees to purchase land, and to erect thereon suitable buildings and fixtures for an academy. In accordance with the terms of this paper, and upon the faith thereof, a lot was purchased, expenditures were made, and liabilities incurred by the trustees, in making such purchase, and in erecting a building. The defendant was one of the trustees, and an active participator in all these proceedings, until nearly \$2,500 had been subscribed. He drew the subscription paper and solicited subscriptions, as a member of the building committee; made a written contract for the purchase of the lot, and took the deed to himself and his associates as said building committee: *Held*, that the defendant was clearly liable to pay the amount of his subscription: *Held, also*, that the defendant having incurred liabilities, and united with his associates in contracting for, and in purchasing the lot and materials, with a full knowledge that the \$2,500 required to be subscribed in order to make the subscriptions binding, had not been all subscribed, these acts were a waiver of the condition, and *estopped* him from asserting a non-compliance with its terms, as an objection to a recovery in an action upon his subscription:

3. *Held, further*, that no time being specified in the subscription paper, within which the \$2,500 was to be raised, a notice from the defendant to the trustees and the building committee, stating that he had erased his name from the subscription paper, and was unwilling to remain a party to the enterprise, was not sufficient to exonerate him from liability, on the ground of non-compliance with the condition at the time notice was given; and that the amount of subscriptions having

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been increased within a reasonable time after the notice to \$4,000, that entirely obviated the objection. Also held, that the action was properly brought in the names of the persons named as trustees in the subscription paper; they being the real parties in interest (*Hutchins* agt. *Smith*, 46 Barb. 221).

4. An agreement by the lessee, to lease to another hotel, and to sell to him liquors under his license, is illegal and void, for a violation of the law between the parties thereto enforced. Nor can a promise, given as a part of the consideration of such an agreement be enforced by one who took the same with full knowledge of the terms and purpose of the agreement, and who was aiding and assisting in carrying it out (*Sanderson* agt. *Goodrich*, 46 Barb. 616).

5. Such a holder stands in the same position the lessee would have occupied had he taken the note and sued upon it; and has no greater right to recover upon it than the lessee would have had. Besides, in taking the proceeds of the void contract, with full knowledge of, and acting in the transaction, the holder becomes a party to it, and for that reason also, he should not be allowed to recover (*Id.*).

6. There is a distinction between a valuable consideration, other than money, and a money consideration. While in the former case, the slightest consideration will support a promise to pay the largest amount, to the full extent of the promise, in the latter, the consideration will support a promise only to the extent of the money forming the consideration. The law leaves the measure of the value of a valuable consideration, other than money, for a promise to pay money, to the parties to the contract; but money being the standard of value, is not subject to be changed by contract, and will support a promise to pay money, only to the amount of the consideration (*Sawyer* agt. *McLouth*, 46 Barb. 360).

7. Where a part of the consideration of an agreement is legal and valid, and a part illegal and void, it may be enforced, provided the several undertakings are distinct, so that what is legal may be separated from what is illegal. But where the consideration to be paid is a gross sum, without the means of separating or distinguishing the good from the bad, an action will not lie upon a promissory note given

for the consideration (*Sanderson* agt. *Goodrich*, 46 Barb. 616).

8. If a party wishes to rescind a contract on account of fraud, he should do it promptly on discovering the fraud. A party cannot have the benefit of a rescission of a contract while he holds the obligation of the opposite party as the consideration of the contract, without offering to cancel it on the trial (*Central Bank at Cherry Valley* agt. *Pindar*, 46 Barb. 467).

9. The defendant, as assignee of an interest to the amount of \$2,000, in a contract for the building of a lake boat, having been obliged to assume the burden of paying workmen and completing the boat, in order to protect his interest, and to advance the funds necessary for that purpose, whereby the amount stipulated by the contract to be paid upon the completion and delivery of the boat, was earned and became due and payable; it was held, that he had a legal right

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able, upon the sum agreed to be paid upon the completion and delivery of the boat according to the terms of the contract, or any part thereof, until the expenses of such completion have been first paid and satisfied (*Osborn* agt. *Thomas*, 46 Barb. 514).

10. Where by the terms of an agreement under seal, the plaintiff was to pay a certain sum in cash, and assumed certain mortgages mentioned in the agreement, and to execute his bond and mortgage for the balance, on a particular day, and the defendant on receiving such payments, and the bond and mortgage on that day, was to convey to the plaintiff certain lots in fee, free from all incumbrances, except said mortgages and a certain lease:

11. Held, that these several acts were to be performed at the same time, and the obligations of the parties in respect to them were, therefore, mutual and dependent (*Mérange* agt. *Morris*, ante, 178).

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12. Ordinarily, in such case, it is incumbent on each party to perform or tender a performance on his part, in order to put the other party in default (*Id.*)

4. But where, as in this case, the defendant was unable to perform his agreement, for the reason that the premises were incumbered with the liens for taxes and assessments, admitted in the answer, the plaintiff was excused from tendering payment and offering to perform on his part on the day specified (*Id.*).

5. A tender of performance need not be made when it would be wholly nugatory. The existence of the incumbrances at the time fixed in the agreement for the execution and delivery of a deed was a breach of the agreement on the part of the defendant, which put it out of his power to perform, and excused the plaintiff from tendering performance (*Id.*).

ALIMONY.

1. As a general rule, when an ac divorce is brought against a and she, in her answer, either her guilt, or sets up affirmances, such as forgiveness or nation, or does both, counsel f alimony will be allowed her, the court is satisfied that she gether in the wrong, or has no reasonable ground of defense. The fact that on a trial had by a jury, on issues framed, involving a denial, forgiveness and recrimination, the jury disagreed, is enough to show that she has reasonable ground of defense, without the positive affidavits of the wife and of witnesses, usually required on motions for such allowance. (*Strong* agt. *Strong*, 1 Abb. N. S. 358.)

ALTERATION OF INSTRUMENTS.

1. The addition of two names to a promissory note as makers, after its execution and delivery, without the knowledge or consent of a person who has previously signed it as surety for the original maker, is a material alteration of the instrument as against such surety, and furnishes him, at his election, with a valid defense to the note. (*McVean* agt. *Scott*, 46 Barb. 375.)

2. Where a surety in a promissory note is insolvent, and has been discharged from liability by a material alteration of the instrument, if he chooses to defend on that ground, the holder is not bound to seek to enforce the note

against him; certainly not unless requested to do so by his co-sureties, even if he is not insolvent. An omission to sue, in such a case, is not equivalent to a release by deed or covenant, or affirmative act in pais. (*Id.*)

AMENDMENT.

1. New parties cannot be added to the action without amendment of the summons; and the summons cannot be amended of course under section 173 of the Code, but leave of the court to amend must be obtained under section 173. (*Walkemahaus* agt. *Perrot*, ante, 310.)

2. A plaintiff can obtain leave to amend the summons under the general prayer contained in his notice of motion, to wit: "for such other order or relief as the court shall see fit to grant." (*Id.*)

3. When a party asks leave of the court to bring in new parties, he necessarily includes in that request a further request for leave to make such amendment and take such steps as shall be requisite to bring into court such new parties. (*Id.*)

4. Provision may be made in the order allowing new parties to be brought in, for the amendment of the summons and complaint, and the service of the summons upon the new parties, and the service of the amended complaint upon the parties already in, specifying in detail the proper proceedings to pursue, or it may simply allow them to be brought in, and the necessary amendments to be made to the summons and complaint, leaving the plaintiff to thereafter conduct the proceedings regularly, at his own peril. (*Id.*)

5. The provision of the Code of Procedure of this State, allowing amendments to be made to cure the omission of a party to do any act necessary to perfect an appeal or to stay proceedings (Code, § 537), does not authorize affixing a United States revenue stamp upon the notice of appeal, after motion to dismiss the appeal for want of such a stamp. (*Loebs* agt. *Randall*, 1 Abb. N. S. 135.)

ANSWER.

1. An answer, in an action on a promissory note, alleging a set-off against the plaintiff's assignor, does not contain a counter-claim requiring a reply, to put the new matter in issue. (*Thompson* agt. *Sickles*, 46 Barb. 49.)

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2. When a joint answer of several defendants denies an allegation in the complaint which the plaintiff must prove to establish his cause of action against some of the defendants, but which he need not prove to entitle him to recover against the others, the answer raises a material issue for the defendants as to whom the plaintiff must prove such allegation. (*Bank of Cooperstown* agt. *Corties*, 1 Abb. N. S. 412.)
 3. Where a defendant relies on a foreign discharge in bankruptcy, as a bar, or on his having entitled himself to a certificate in bankruptcy, by which the cause of action is abated, he must set forth not only the statute, but the certificate or discharge, and the prior proceedings which warranted the granting of it; or if no discharge or certificate has been granted, the facts in the proceedings relied on as an accord (*Philpe* agt. *James*, 1 Abb. N. S. 311).
 4. An answer interposing the statute of limitations, presents a proper case for the court to require on defendant's motion, that the plaintiff reply. It is not generally essential that the defendant, in moving to compel such reply, should state that he does not know the ground on which the plaintiff intends to rely to defeat the bar of the statute (*Hubbell* agt. *Fowler*, 1 Abb. N. S. 1).
- APPEAL.
1. An order removing a trustee held appealable, and that upon such appeal the court of appeals will examine the affidavits and evidence, and the whole merits of the determination appealed from. (*Matter of Livingston*, *Court of Appeals*, ante, 20.)
 2. When one judge of the supreme court overrules the decision of another judge, under pretext of a rehearing, upon substantially the same state of facts, and when orders are made, subsequent thereto, by which a valid settlement and final discontinuance of the proceedings were avoided, upon grounds which were not only false in fact, but insufficient in substance; it involves a principle which affects the administration of justice in this state, and presents a question eminently proper to come before the court of appeals for review. (*Id.*)
 3. In such a case, the court of appeals have power to examine the whole case upon the merits, and to make such order in the premises as it shall deem suitable and proper, in view of all the circumstances. (*Id.*)
 4. The rules and practice of the courts have been established to protect the rights of parties, and constitute a part of the equitable jurisprudence of this community. (*Id.*)
 5. Where a final judgment provides that the plaintiff recover of the defendants \$42.05 damages without costs, and that the defendants recover of the plaintiff \$42.05 for costs and disbursements, and that said judgments offset or satisfy each other: It is appealable from, at the suit of the aggrieved party. (*Houland* agt. *Coffin*, ante, 300.)
 6. Where facts are found by a referee in his report, on which judgment in conformity with the report is entered, in case the judgment is reversed at general term and new trial granted, but the findings are not interfered with by the general term in their decision, on an appeal to the court of appeals from such order granting a new trial, the latter court are not at liberty under section 272 of the Code to weigh the evidence and to determine whether or not they should have reached the same conclusion as the referee. (*McMahon* agt. *Allen*, *Court of Appeals*, ante, 313.)
 7. A defendant having served notice of appeal, the mere service of a notice of argument by the plaintiff does not preclude him from enforcing payment of the judgment; no stay of proceedings having been given or applied for. (*Arnoux* agt. *Homans*, ante, 382.)
 8. Where a judgment was entered in a justice's court on the 14th day of November, and the plaintiff served a notice of appeal on the justice on the 4th day of December, and upon the defendant's attorney (the defendant being a non-resident of, and absent from, the county) on the 5th day of December: *Held*, that the notice was not served on the defendant in time, as the time for appealing expired with the 4th day of December. (*Young* agt. *Whitcomb*, 46 Barb. 615.)
 9. It seems that all the defendants may join in an appeal from a judgment against them on their joint answer as being frivolous, if the answer be sufficient as respects some of them. (*Bank of Cooperstown* agt. *Corties*, 1 Abb. N. S. 412.)
 10. An appeal from an order refusing to require the complaint to be made definite and certain, sustained, and the

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- order reversed. (*Arrietta* agt. *Morrissey*, 1 *Abb. N. S.* 489.)
11. A motion to dismiss the complaint at the trial of an action on a policy of insurance, upon the ground that the proofs of loss served on the defendants were not in compliance with the terms of the policy, does not authorize the defendants to raise the objection, on appeal, that the person on whom the magistrate's certificate was served was not the authorized agent of the defendants to receive it. (*Van Deusen* agt. *The Charter Oak Fire and Marine Insurance Company*, 1 *Abb. N. S.* 349.)
12. The objection that the cause of action proved is not that alleged, so that there is a failure to prove the complaint in its entire scope and meaning, if taken on a motion, at the trial before a referee, to dismiss the complaint upon the plaintiff's evidence, is available on appeal from a judgment for the plaintiff upon the referee's report in his favor, although no exceptions were taken to the report upon the ground that the cause of action as found was not that set forth in the complaint. (*Patterson* agt. *Patterson*, 1 *Abb. N. S.* 262.)
13. On appeal from a judgment entered on a verdict, which includes a recovery on separate causes of action, one of which is not sustained by the evidence, if the evidence relied on in its support was not admissible in support of the other cause of action, and yet was such as may have prejudiced the jury in reference thereto, the court will not allow, absolutely, the respondent to retain his judgment on deducting the erroneous part, but will allow the appellant a new trial on terms. (*Ayrault* agt. *The Pacific Bank*, 1 *Abb. N. S.* 381.)
14. An appeal from an order denying a motion for a new trial, made on the judge's minutes, may be taken to the general term, notwithstanding judgment has been entered upon the verdict. (*Following* 22 *How. Pr.* 385; and *disapproving* *Id.* 386.) Section 349 of the Code of Procedure, giving the right of appeal from such an order, does not limit the right to cases where judgment has not been entered. Should the verdict be set aside, the special term may, on motion, vacate the judgment (*Lane* agt. *Bailey*, 1 *Abb. N. S.* 410).
15. Where the case contains no finding of facts, the appellant is not entitled to be heard on his appeal (*Leland* agt. *Cameron*, 31 *N. Y. R.* 115).
16. Where an executor is cited before a surrogate to show cause why an execution should not issue against the estate of his testator, and after a full hearing, the surrogate makes an order granting leave to issue such execution, no appeal lies from such order. It seems, that the making of such order is in the discretion of the surrogate (*Mount* agt. *Mitchell*, 31 *N. Y. R.* 385).
17. The judgment of a justice of the peace should not be reversed by the county court, unless it clearly appear that the judgment of the justice could not have been justified by the evidence. So long as there has been legal evidence on both sides of the question adjudicated upon, the county court should not reverse the judgment, even if it arrive at a conclusion as to the facts different from that adjudged by the justice (*Burnham* agt. *Buller*, 31 *N. Y. R.* 480).
18. Where no exceptions are taken on the trial, and no conclusions of fact stated, which can raise any questions of law, and no conclusions of law are stated, this court has no jurisdiction to review the case. The general term had jurisdiction to set aside the report of the referee as being against evidence, if they had found it impeachable on that ground. But on affirming the judgment, it has left nothing for this court to do in the premises (*Doty* agt. *Carolus*, 31 *N. N. R.* 547).
19. Where there have been two trials of a cause in the supreme court, the judgment record upon the second trial should not embrace the case made upon the first. An appeal from a judgment entered after a second trial, brings up for review only the judgment appealed from. If the record transmitted to this court, contains, in addition to the case and exceptions made upon the second trial, the case made upon the first trial, on a motion to set aside a non-suit, the latter proceedings may, and properly should, be stricken out on motion. This court only reviews the questions of law presented by the exceptions stated and taken in the case. If the case contains no exceptions, it presents no question for review in this court (*Wilcox* agt. *Hawley*, 31 *N. Y. R.* 648).
20. Where a case is sent back by this court for a new trial, indicating the proper disposition to be made of it by the court of original jurisdiction, the practice requires a new judgment by that court, and a new formal appeal to the general term, before an appeal lies to this court. Any party, whose

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rights are affected by the last judgment of the special term, may appeal therefrom within the time prescribed by statute, and such appeal will bring up any question properly arising in the course of the trial (*New York and New Haven R. R. Co. agt. Schuyler*, 34 N. Y. R. 80).

21. On appeals from the decrees of surrogates, the review is in the nature of a rehearing in equity; and the admission of improper evidence on the original hearing, will not justify a reversal of the final decision, if the facts established by legal and competent evidence are plainly sufficient to uphold it (*Clapp agt. Fullerton*, 34 N. Y. R. 190).
22. An exception to a refusal to adopt in gross a series of propositions in the form of requests to charge, is unavailing if either of the propositions be erroneous. The attention of the court should be drawn to each, and each should be the subject of a specific ruling by the judge, and a specific exception by the party (*Magee agt. Badger*, 34 N. Y. R. 248).
23. To make an exception to the judge's charge effectual, it must be distinct and explicit, or the judge must be requested to charge to the effect desired by the party excepting. An objection that the verdict was against the evidence, cannot be raised in this court, when it was not presented at the circuit or to the general term, and where the evidence was discussed before the jury, and passed upon by them. In the present case: *held*, that there was sufficient evidence on which to base the verdict of the jury. An objection that the judgment is erroneous in form, cannot be raised in this court. It is a question of practice, which is the proper subject of an application to the special term; as that a judgment in replevin erroneously directed the payment of money, in addition to awarding a return of the property (*Buck agt. Remsen*, 34 N. Y. R. 383).
24. An order granting or refusing an extra allowance of costs, is only reviewable, if at all, as an intermediate order, on an appeal from the judgment. Such is not a "final order, affecting a substantial right," within the meaning of the third subdivision of the eleventh section of the Code of Procedure. (*Clark agt. City of Rochester*, 34 N. Y. R. 355).
25. The application to the supreme court, by a receiver of an insurance company, for an order to commence an action upon the facts stated in the

application, is addressed to the discretion of the court, and the order of the court thereupon is final, and cannot be reviewed on appeal. Nor can it be made appealable by any assumption of the attorneys in the case, contrary to the actual facts adjudicated (*In re Reeve*, 34 N. Y. R. 359).

26. Where the judgment of the referee is reversed by the general term, and it is stated in the judgment of reversal that such reversal was made upon questions of fact, it is the duty of this court to examine the facts of the case, as well as the law, and to decide whether the judgment should have been reversed by the general term upon the facts. The whole case upon the facts, is presented to this court for review (*Petersen agt. Ransom*, 34 N. Y. R. 370).

See REHEARING.

See COSTS, 5, 6.

ARREST.

1. Where a defendant is arrested for fraudulent representations in contracting the debt upon which the action is brought, in the N. Y. district court, on being brought before the justice upon the warrant, he may read counter affidavits to those of the plaintiff, and move thereon to discharge the arrest. But this must be done before issue joined (*Johnson agt. Florence*, *ante*, 230).
2. When a person is arrested without warrant, and the law requires that the person so arrested shall be "immediately and without delay," conveyed before the nearest magistrate, it is the plain duty of the superintendent of police in New York to govern his force accordingly, and not to direct the imprisonment of the person arbitrarily, and without process of law for several days (*Green agt. Kennedy*, 46 Barb. 16).
3. Where the summons was for money, only, and the complaint followed the summons, claiming to recover the value of two promissory notes taken by the defendant from the wife of the plaintiff; and there was no allegation that the notes were taken illegally, wrongfully or improperly, nor that they had been wrongfully converted or detained: *Held*, that the action was not an action for a tort, so as to authorize an execution to be issued against the body, on a judgment for costs upon a dismissal of the complaint. The obtaining and issuing of an order of arrest, will not have the effect to fix the character of the action,

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unless the order is served upon the defendant (*The People ex rel. Waldron agt. Carpenter*, 46 Barb. 619).

4. Where the plaintiff in an action on contract obtains an order of arrest, on which the defendant is taken, the subsequent exoneration of the defendant from imprisonment for debt, under the provisions of 2 Revised Statutes, 90, section 10, precludes the plaintiff from procuring a second arrest in an action sounding in tort, but founded on the same transaction as the alleged cause of action on contract. Thus a fraudulent purchaser of goods, who has been sued on the contract of sale, and arrested in the action on the ground of fraud in contracting the debt, cannot, after he has been exonerated for imprisonment for debt, be arrested in a suit for damages for conversion of the goods (*Wright agt. Rittlerman*, 1 Abb. N. S. 428).
5. When a defendant has been discharged from imprisonment under an order of arrest by due course of law, he should not be re-arrested and imprisoned a second time for the same cause, though in a different form of action (*People agt. Kelly*, 1 Abb. N. S. 432).
6. Under the provisions of 2 Revised Statutes, 556, where a defendant has been arrested in the action, the three months within which the plaintiff must charge him in execution, is from the last day of the special term for non-enumerated motions, following that at which judgment was obtained (*Haviland agt. Kane*, 1 Abb. N. S. 409).
7. In an action brought to recover the value of chattels of the plaintiff, converted by a defendant, it is not ground for discharging an order of arrest that the defendant has a claim for a larger amount against the plaintiff (*Huellet agt. Reynolds*, 1 Abb. N. S. 27).
8. To authorize a justice of a district court to adjudge a party subject to arrest under a judgment against him, the right to arrest must be stated in the judgment, and must form a part of the same (*Carpenter agt. Willett*, 31 N. Y. R. 90).

ASSAULT AND BATTERY.

1. If the owner of land overhung by the branches of a fruit tree growing upon the adjacent lot, attempts by violence to prevent the owner of the adjacent lot from picking the fruit on the overhanging branches, he is a wrongdoer, and an action for an assault and bat-

tery may be maintained against him (*Hoffman agt. Armstrong*, 46 Barb. 387).

ASSETS.

1. The Revised Statutes, making "growing crops" on the land of the deceased, at the time of his death, assets in the hands of his executors, &c., have not changed the law as to the construction of wills, in the ultimate disposition thereof. Such "growing crops" now, whether bequeathed or devised, go primarily to the executors, &c., to be used, if necessary, for the payment of debts and legacies; but if not necessary for that purpose, they go to the beneficiary under the will. The devise of a farm, in the absence of any modifying words, now, as before the statute, carries with it the crops growing thereon (*Bradner agt. Falkner*, 34 N. Y. R. 347).

ASSIGNABILITY OF CAUSES OF ACTION.

1. An action to recover damages for the fraudulent misapplication or conversion of property by an officer or agent of a banking association, is assignable; and the officer or agent may be arrested and held to bail at the suit of the assignee (*Grocers' National Bank agt. Clark*, ante, 160).
2. The attribute of assignability is not confined to rights of action belonging to natural persons; it extends with equal effect to those belonging to artificial persons (*Id.*).
3. An action brought by an assignee of a claim for damage for the breach of a contract of a common carrier to carry goods, is an action by an assignee of a promissory note or chose in action, within the meaning of the judiciary act, and cannot be removed into the circuit court of the United States (*Ayres agt. The Western Railroad Company*, ante, 351).
4. There is no constitutional provision that prohibits railroad franchises being conferred upon or exercised by individuals, nor does there appear to be any objection to making such rights assignable (*N. Y. and Harlem Railroad Co. agt. The Forty-second Street, &c. Railroad Co.* ante, 481).

ASSIGNMENT.

1. J. E., during the lifetime of his father, J. P. E., for the purpose of securing the payment of a *bona fide*

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debt due to S., executed an instrument by which he constituted and appointed S. his attorney irrevocable, and coupled with an interest, to ask, demand, sue for and recover, all such interest, estate, property and effects, real and personal, as he then had, or at any time thereafter might have or claim, as heir at law, devisee, legatee or next of kin of his father, and apply the same to the payment of the said debt and interest. S., after the death of J. P. E., assigned to J. B. S., all her interest in the estate of J. P. E., who died intestate, seised of real and personal estate, and leaving him surviving J. E., his son and heir at law: *Held*, that J. B. S. acquired an interest in the estate, by virtue of the said instrument and assignment, which in equity should be protected, and which constituted a right paramount to a claim asserted by a creditor of J. E., under attachment proceedings against the latter (*Stover* agt. *Eycleshimer*, 46 Barb. 84).

2. By an assignment of an interest in a demand, as collateral to a debt, the assignor continuing the prosecution of the suit, and remaining liable for the debt until paid, the assignee is not thereby rendered liable for the costs (*Wolcott* agt. *Holcomb*, 31 N. Y. R. 125).
3. Where the attorney of an insolvent plaintiff takes from him an assignment of the judgment as security for the amount of costs he has included in such judgment, and the plaintiff continues the further prosecution of such suit on appeal, the assignee is not liable for the costs in such action (*Id.*).

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

1. Where a transfer of property, real and personal, is obtained fraudulently and inequitably, by false representations made by the transferee to the transferer—by abuse of a fiduciary relationship—by practice on a reckless and improvident sailor—and where the transferer makes a subsequent conveyance of his property and causes of action to the plaintiff for the benefit of his creditors, by a voluntary assignment; such voluntary assignee may maintain in his own name a bill to set aside the first conveyance, as having been fraudulently and inequitably obtained (*Mc Mahon* agt. *Allen*, *Court of Appeals*, ante, 313).
2. The decision of the general term in New York, in this case (34 Barb, p. 56),

on that point overruled. And the late case of *Dickinson* agt. *Burrell* (*Law Rep. Equity Series*, 1866, part 3, March, p. 337), approved of as a well considered case (*Id.*).

3. The case of *Prosser* agt. *Edmonds* (1 *Young & Coll. Eq. Rep.* 481 (and *Nicoll* agt. *The New York and Erie Railroad Co.* 2 Kern. 121). explained and commented on (*Id.*).
4. The cases of *Livingston* agt. *Peru Iron Co.* (9 Wend. 511), and *Yates* agt. *Williamson* (1 *Law Rep. Eq. Series*, p. 528), approved of (*Id.*).
5. A person standing in a fiduciary relation to an heir or person entitled to property, cannot enter into any treaty for the purchase of that estate, without communicating to him every particle of information that he himself possessed with respect to its value (*Id.*).
6. Where an assignment for the benefit of creditors, provides that the trust is "to apply the proceeds towards the payment of the persons or corporations, holders now or at any future time, for the time being," of a specified class of notes of the assignors, the meaning is that the assignees shall pay debts outstanding at the time of the execution of the trust; and not that they should make a distribution on the basis of the original indebtedness (*Midgeley* agt. *Slocumb*, ante, 423).
7. Consequently, where a bank, a creditor holding notes belonging to the class mentioned in the assignment, to a large amount, which were secured in part by a pledge of notes of other parties, which latter notes had been collected by the bank: *held*, that the law applied these collections to the payment of the principal debt, so that the bank had ceased to be the holder of the notes thus paid, and was not entitled to a dividend on the basis of of the original indebtedness (*Id.*).
8. Where a person who is insolvent at the time, transfers his interest in a legacy, for an inadequate consideration, to a party who is aware of his insolvency, the creditors of the assignor may maintain a suit in equity to have their debts satisfied out of the interest or fund beyond the consideration actually paid or agreed to be paid; even though the transaction was not in fact fraudulent, so as to authorize the court to set it aside on that ground. In such a case the assignor, in the absence of any fraudulent design in making the transfer, may obtain the same relief

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himself, by showing that it was made under the pressure of his debts or other importunate needs. And certainly equity should regard with quite as much favor the claims of his creditors; especially in a case where it appears that he intended to defraud them by a cheap transfer of his estate (*Bigelow Ayrault*, 46 Barb. 143).

9. Where the assignees of a lessee leased the premises for the best price they could obtain, and paid to the landlord all that they received, which was accepted by him, and they surrendered the possession: *Held*, that the assignees, having fully administered and paid out according to the terms of the assignment all the moneys they had received from the assigned estate could, at most, only be charged personally with the value of the use and occupation of the premises; and that evidence to determine that value should have been received (*Peckham, J. dissented, Jermain agt. Pattison*, 46 Barb. 9).

10. The liability of assignees under an assignment for the benefit of creditors, is to be determined by the same rule which applies to executors, under similar circumstances, *it seems* (*Id.*).

11. What the assignors did, before they made the assignment, in contemplation of making it, is evidence upon the question of their intention in making it, proper for the consideration of the jury. The rule is well settled, that where the validity of a sale or assignment of goods depends upon whether it was made with intent to hinder, delay or defraud creditors, the judge is bound to submit the case to the jury (*Peck agt. Crouse*, 46 Barb. 151).

12. Where there has been a voluntary assignment for the benefit of creditors, a partial payment of a debt by the assignee does not take the case out of the statute of limitations. The act of the assignee in paying a portion of the debt is beyond the control of the assignor, who cannot accompany the payment with a qualification or disclaimer, as when made by himself (*Pickett agt. Leonard*, 34 N. Y. R., 175).

ATTACHMENT.

1. The Code does not authorize an attachment in an action for a tort (*Sadlesvene agt. Arms*, ante, 280).

2. It was not intended by sections 227 and 229, to extend the remedy by attachment to cases other than those specified in the Revised Statutes. (*All*

the reported cases on this question under the Code, examined.) (*Id.*)

3. In an action upon an undertaking given in an attachment suit, after verdict and judgment in the latter suit, the defendant—the surety in the undertaking—cannot introduce testimony on the trial to show in contradiction of the recitals in the undertaking, that no application had been made for the discharge of an attachment in the action in which the undertaking was entitled, and that no attachment had been issued or granted (*Coleman agt. Bean*, ante, 370).

4. It is not essential to the validity of the undertaking, that the plaintiff should compel its execution by actually suing out an attachment and making a levy (*Id.*).

5. It is competent for the parties to the action to waive, if they choose, the issuing of an attachment and a seizure of property under it, and for the defendant to give, and the plaintiff to accept, in consideration of the waiver, such an undertaking as the defendant would have been required to give in an application to discharge an attachment actually issued and levied (*Id.*).

6. The fact that the defendant has put in an undertaking, which recites that an attachment had been issued, and that he was about to apply for its discharge, is conclusive evidence of such waiver. It is enough that the undertaking is binding between the principal parties, under such circumstances, to hold the sureties (*Id.*).

7. Where such an undertaking has been procured by the agent of the plaintiff, and the plaintiff having received it upon a valid legal consideration, and being ignorant of any false or fraudulent representations alleged to have been made by his agent in obtaining the undertaking, and in no way responsible for it, such fraud cannot be set up to deprive him of the benefit of the undertaking.

8. Where an injunction order improperly restrains certain acts of the defendant, and during its continuance these acts are performed by the defendant in technical violation of the injunction, but subsequently the injunction is modified so as to dispense with the clause improperly restraining such acts, an attachment for such violation of the injunction, applied for and issued after the modification of the injunction, cannot be sustained (*Peck agt. Yorks*, ante, 408).

9. Where a party has been arrested

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upon an attachment for contempt, and has given a bond with sureties for his appearance at court, to abide the order of the court, and has been adjudged to have been guilty of the misconduct alleged, and punishment by fine and imprisonment ordered, the statute does not authorize the bond to be prosecuted at the same time that a warrant of commitment is issued against the party. It is not the policy of the statute to give the aggrieved party two final and complete remedies for the same offence (*Barton* agt. *Butts*, ante, 456).

10. A subsequent attachment creditor cannot move to discharge an attachment issued in a prior suit, on the ground that it was irregularly issued. He has no standing in court to make such a motion, by petition or otherwise. Where a subsequent creditor does not allege or pretend that the debt or claim for which the first action was brought was not just and *bona fide*, nor that there was any collusion between the plaintiff and defendant in that action, he should not, on principle, be permitted to make such a motion (*Isham* agt. *Ketchum*, 46 Barb. 48).
11. It seems, that in an action between partners for a dissolution of the firm, an accounting, and the payment of an alleged balance, an attachment cannot be issued, though the defendant be charged with fraudulently disposing of the property of the firm (*Ketchum* agt. *Ketchum*, 1 Abb. N. S. 157).
12. Defendant may move to set aside an attachment against his property without putting in a general appearance in the action (*Manice* agt. *Gould*, 1 Abb. N. S. 255).
13. A mere creditor without judgment, though he has commenced an action, and procured the issue of an attachment, cannot move to set aside a prior attachment irregularly issued against the property of the same debtor, and levied before his action was commenced. Whether, after judgment, the regularity of the attachment can be inquired into in a collateral proceeding, *quere*? (*Ketchum* agt. *Ketchum*, 1 Abb. N. S. 157).
14. In justice's court, to obtain an attachment against a non-resident, the affidavit upon that point is sufficient, as against third parties, if it states "that the deponent (plaintiff) applies for an attachment on the ground that the defendants are not residents of that county, but are residents of another county." The affidavit in this

case is sufficient to give the justice jurisdiction, as against third parties, and cannot be attacked collaterally by them. The approval of the bond by the justice is sufficient, as against third parties, even if he does not expressly certify it was executed in his presence. The return by the officer upon the attachment, stated in this case, is sufficient to give jurisdiction as against third parties (*Bascom* agt. *Smith*, 31 N. Y. R. 594).

15. Where a party takes several different objections to evidence, and the court excludes the same upon a single ground, and on appeal that ground is held erroneous, but some of the other objections are well taken, the court will not sustain the decision upon the other grounds, unless they are such as could not be obviated on a second trial. The objection that the original papers could not be proved by the certificate of the justice, is an objection that might be obviated on a second trial, and, therefore, the decision below should not be sustained upon that objection, as the court did not place its ruling upon that ground (*Id*).
16. A party attaching property in the possession of his debtor, acquires a specific lien on his interest therein, and is entitled, like a judgment creditor, to impeach the title of a fraudulent mortgagee (*Frost* agt. *Mott*, 34 N. Y. R. 253).

ATTORNEYS.

1. The subscription of the name of an attorney issuing a summons, is not required to be made by himself personally; but it may be made by another with his authority. It necessarily follows that his name may be printed, as a substitute for his written signature. (*This agrees with the case of the Mutual Life Ins. Co.* agt. *Ross*, 10 Abb. 260, and is adverse to the case of the *Farmers' Loan and Trust Co.* agt. *Dickson*, 17 How. 477.) *Brainerd* agt. *Heydrick*, ante, 97.)
2. It is well settled, that where a person is in the habit of using documents with his name printed thereon, this will be his signature within the meaning of the statute of frauds (*Id*).
3. The name of an attorney issuing a summons, is as effectually disclosed when it is printed as if it were written, and his responsibility to the defendant and to the court, in either case is the same (*Id*).
4. Previous to the act of congress passed

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January 24, 1865, attorneys and counsellors at law were, under the second rule of the court, admitted to the bar of the supreme court of the United States, by presenting evidence to the court that they had been attorneys and counsellors at law for three previous years in the highest courts of the states to which they respectively belonged, and that their private and professional character appeared to be fair (*In the matter of A. H. Garland, ante*, 241).

5. On the 24th of January, 1865, congress passed a supplementary act, making the provisions of a former act passed July 2d, 1862, applicable to attorneys and counsellors at law; by which last mentioned act they were required, before being admitted to the bar of the supreme court of the United States, to take and subscribe an additional oath;
6. *First*. That the deponent has never voluntarily borne arms against the United States since he has been a citizen thereof;
7. *Second*. That he has not voluntarily given aid, countenance, counsel or encouragement to persons engaged in armed hostility thereto;
8. *Third*. That he has never, sought, accepted, or attempted to exercise the functions of any office whatsoever, under any authority or pretended authority, in hostility to the United States
9. *Fourth*. That he has not yielded a voluntary support to any pretended government, authority, power or constitution within the United States, hostile or inimical thereto; and
10. *Fifth*. That he will support and defend the constitution of the United States against all enemies, foreign and domestic, and will bear true faith and allegiance to the same:
11. *Held, 1st*. That this statute, except the last clause, which is promissory only, is directed against parties who have offended in any of the particulars embraced by the above clauses, and its object is to exclude them from the profession of the law, or at least from its practice in the courts of the United States (*Id*).
12. *2d*. As the oath prescribed cannot be taken by these parties, the act as against them operates as a legislative decree of perpetual exclusion (*Id*).
13. *3d*. An exclusion from any of the professions, or any of the ordinary avocations of life for past conduct, can

be regarded in no other light than as a punishment for such conduct (*Id*).

14. *4th*. The exaction of the oath is the mode provided for ascertaining the parties upon whom the act is intended to operate, and instead of lessening, increases its objectionable character (*Id*).
15. *5th*. All enactments of this kind partake of the nature of bills of pains and penalties, and are subject to the constitutional inhibition against the passage of bills of attainder, under which general designation they are included And—
16. *6th*. In the exclusion which the statute adjudges, it imposes a punishment for some of the acts specified, which were not punishable, or may not have been punishable at the time they were committed; and for all the acts it adds a new punishment to that then prescribed, and it is thus brought within the further inhibition of the constitution against the passage of an *ex post facto law*:
17. *Held*, further, that the effect of the pardon by the President, of the petitioner, is to relieve him from all penalties and disabilities attached to the offence committed by his participation in the rebellion, so far as that offence is concerned. He is thus placed beyond the reach of punishment of any kind. And it is not within the constitutional power of congress to inflict punishment beyond the reach of executive clemency (*Id*).
18. From the petitioner, therefore, the oath required by the act of January 24th, 1865, cannot be exacted. The prayer of the petitioner must be granted, and the amendment to the second rule of the court, which requires the oath prescribed by the act of January 24, 1865, having been unadvisedly adopted, must be rescinded (*Id*).

BAILEE.

1. The defendant, being in possession of the plaintiff's goods, under an agreement which had expired, refused to deliver them up to the plaintiff on demand, for the reason that they had been attached by the sheriff as the property of one Quinton Rogers, under a claim that the plaintiff held the title in trust for and in fraud of the creditors of Quinton Rogers. The jury having negatived the fraud: *held*, that there was sufficient evidence of a conversion by the defendant (*Rogers agt. Weir*, 34 N. Y. R. 463).

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2. A bailee, who sets up the title of another as an excuse for not delivering up the goods to the owner, makes himself a party to the controversy, and must stand or fall by his title. The law, it seems, will protect the bailee in a case of doubt, if instead of refusing the demand he remains neutral, and suffers the claimant to take the goods upon his own responsibility. So, it seems, if he qualifies his refusal by answering that he is ready to deliver the goods as soon as he has made some reasonable inquiry as to the evidence of the title, provided such excuse is made in good faith. A sheriff, who seizes the goods of another than the defendant in the attachment, is liable to the true owner in an action for trespass. The principle that goods levied upon by the sheriff, under an attachment, are in the custody of law, only applies as between the sheriff and the defendant in the attachment suit. Whether it applies as between the sheriff and the true owner, when seized under a writ of replevin against another party, *quere?* (*Id.*).

BANKRUPTCY.

1. Of the requisite proceedings to obtain a discharge under the English insolvent laws; and what must be pleaded in setting up a discharge under such statutes (*Philipe* agt. *James*, 1 Abb. N. S. 811).

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. Where a note payable at the "Bank of Kent, Kent, N. Y.," was deposited with the Union Bank, N. Y., for collection, without any other direction as to the post office address of the Bank of Kent, the Union Bank was authorized to send the note to the address designated in the note, and was exonerated from liability, on its failure to reach the Bank of Kent (*Chapman* agt. *The Union Bank*, ante, 95).
2. Where there is no evidence produced on the trial dispensing with the notice of demand and non-payment to the drawer of a dishonored check, and no such demand and notice having been proved, the plaintiffs are not entitled to recover upon it against the drawer (*Jaudon* agt. *Read*, ante, 190).
3. Where a creditor made a loan to his debtors, upon an agreement that they would repay it out of the proceeds of a note for a much larger amount which they had procured to be indorsed by

a third person for their accommodation, or would deliver the note to him; and the note not being discounted, they subsequently delivered it to him, in satisfaction of the loan and of their prior indebtedness: *Held*, that the contract was to be regarded as entire, and that he had parted with a new consideration sufficient to make the indorsement binding. *It seems*, that the indorser in such a case would not be exonerated by mere proof of notice to the purchaser of the note, that the partnership between the makers had been dissolved subsequent to the date of the note (*Smith* agt. *Mulock*, 1 Abb. N. S. 875).

4. The whole duty of a holder of a protested bill is discharged by notice to his immediate indorser; and all parties to the bill or note will be charged if they receive notice in due course from their immediate subsequent indorsers. When the collecting agent of the holder resides in the same city with one of the indorsers of the bill, it does not modify the rule as above stated (*West River Bank* agt. *Taylor*, 34 N. Y. R. 128).
5. One who purchases a note from the payee, on the faith of a written statement by the maker that it is business paper, can recover against the latter, though the statement turns out to be untrue (*Lynch* agt. *Kenneday*, 34 N. Y. R. 151).
6. One who purchases commercial paper for full value before maturity, without notice of any equities between the original parties, or of any defect of title, is to be deemed a *bona fide* holder. He is not bound, at his peril, to be upon the alert for circumstances which might possibly excite the suspicions of wary vigilance. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by a speculative issue as to diligence or negligence (*Magee* agt. *Badger*, 34 N. Y. R. 248).
7. Where the state was entitled to and did pay its draft absolutely, without paying certain interest which had accrued to a party who had discounted the same for the payee, the payee of said draft, though liable to pay to his indorsee such interest, is not entitled to the possession of the draft. Ordinarily the indorser on paying a draft, is entitled to its possession, that he may have his remedy against the acceptor, &c.; but where there can be no such remedy, by reason that the acceptor has, by payment, discharged all his liability, such rule does not apply (*Streener* agt. *Bank of Fort Edward*, 34 N. Y. R. 413).

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BILLS OF LADING.

1. A bill of lading can be transferred by delivery merely, without any indorsement or written assignment, so as to transfer the property in the goods which it represents to the holder. It was agreed between V. and the defendants that the latter should advance money to V. to buy corn at Chicago, to be put in store and shelled, and to be the property of the defendants while in store, so far as they had advanced money on it, and to be shipped for their account, and the bills of lading to be sent to them, and their advances to be reimbursed from the proceeds of the corn. V. purchased and shipped several cargoes of corn, and drew on the defendants for the amount. To procure funds to pay for the last cargo shipped, V. drew a bill upon the defendants for \$3500, which was discounted by the plaintiff; V. at the same time delivering to the plaintiff a duplicate bill of lading of the corn, attached to the draft as collateral security for the payment of the draft: *Held*, that no right of lien, founded on the general arrangement between V. and the defendants, and the payment by the latter of a larger sum, by way of advances, than the aggregate of V.'s purchases, could prevail against the plaintiff's special or specific rights as the *bona fide* transferee of the bill of lading (*The Marine Bank* agt. *Wright*, 46 Barb. 45).

BOARD OF EDUCATION.

1. By the provisions of the act of 1864, principals (teachers) and vice principals (teachers) for the common schools in the several wards of the city of New York, shall be appointed by the Board of Education, upon the written nomination of a majority of the trustees of the ward (*People* agt. *Board of Education*, ante, 167).
2. The actual appointment being thus vested in the Board of Education, it necessarily follows that the power of removal of teachers is also vested exclusively in said board. Consequently the Board of Education have the power of deciding when a vacancy in the office of a teacher has occurred (*Id.*).
3. Therefore, the tender of resignation by a principal or vice principal should be directed and delivered to the Board of Education, and not to the trustees of common schools of the ward where such principal or vice principal is acting (*Id.*).

BOARD OF HEALTH.

1. The act creating the Board of Health in the city of New York, is *not unconstitutional*: 1st. Because as alleged, conferring the right on the board to deprive a citizen of his liberty and of his property, without due process of law;
2. 2d. Because as alleged, conferring upon the board powers of local legislation, which, under the constitution, can be conferred by the legislature only upon boards of supervisors, municipal corporations and incorporated villages;
3. 3d. Because as alleged, it confers upon the board judicial powers, in contravention of the sixth article of the constitution, which provides for and limits the judicial department of the government (*Cooper* agt. *Schultz*, ante, 107).

BONA FIDE PURCHASER.

1. The general principle is well established, that to constitute a person a *bona fide* purchaser, within the meaning of the recording acts, the party receiving the subsequent conveyance must not only have received the same without notice of the prior unrecorded deed, but he must have received the same upon some new consideration advanced at the time, or must have relinquished some security for a pre-existing debt due him. This rule, however, does not apply to any but the original purchaser from the person from whom both parties claim title (*Webster* agt. *Steenbergh*, 46 Barb. 211).
2. And a purchaser from one who is protected by the recording act, as against a prior unrecorded conveyance of the same land, is himself entitled to such protection, notwithstanding he purchased with notice of the prior conveyance, or without parting with a valuable consideration (*Id.*).
3. Where the maker of a promissory note, by falsely representing that the payee is to advance to him the money thereon, procures a third party to guarantee the same, the payee taking the same in good faith, and for value, may enforce the guaranty. The law imposes the loss upon the party who, by his misplaced confidence, has enabled another, on the faith of his obligation, to obtain money or property from an innocent third party (*McWilliams* agt. *Smith*, 81 N. Y. R. 294).

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4. Where a plaintiff, by his own voluntary act, has, through misplaced confidence, conferred the apparent right of property in bank stock upon a third party, a *bona fide* purchaser of such stock from such party will be protected against any secret trust in favor of the plaintiff. But where a party, having notice, actual or constructive, of the plaintiff's equities, has dealings in respect to such stock, he will hold subject to the plaintiff's rights (*Crocker* agt. *Crocker*, 81 N. Y. R. 507).

BOND.

1. A bond given to discharge a vessel from an attachment under the act of 1862, is not void by reason of irregularities in the issuing of an attachment (*Per ROBERTSON*, *Ch. J.*, *Delaney* agt. *Brett*, 1 Abb. N. S. 421).
2. Where one of several defendants, against whom a personal judgment had been recovered, gave a bond with sureties, conditioned for the payment of the amount of the judgment, whenever ordered by the final decision of the court, such bond being given as a condition imposed by the court for refusing to appoint a receiver of specific property, upon which the judgment against the defendant had been declared a lien: *Held*, that it was no defence to an action on such bond, that, upon an appeal, the judgment was subsequently modified by reversing it so far as it imposed any personal liability upon the defendant who gave such bond, and affirming it as to the others (*Ford* agt. *Townsend*, 1 Abb. N. S. 159).

BROKER.

1. A broker employed to negotiate a sale, is not entitled to commissions until he has performed the undertaking assumed in the contract with his principal. When he produces a proper party, ready to make the purchase at a price satisfactory to the principal, he performs his undertaking, and is entitled to his commissions, unless the principal has already parted with the property (*Moses* agt. *Bierling*, 81 N. Y. R. 462).
2. When the principal contracts with the broker for the exclusion of all other agencies, he cannot relieve himself from liability for commissions, by negotiating a sale in fraud of the agreement, through the agency of a different broker. When one of the contracting parties either waives or prevents the literal performance of a

condition precedent, which the other is ready and offers to fulfill, he cannot avail himself of such non-performance to relieve him from his own obligation (*Id.*).

CANAL COMMISSIONERS.

1. When the canal commissioners, in pursuance of the authority of the statute (1 R. S. 221, § 19), alter a public highway which interferes with the proper location, &c., of the canal, the fee simple of so much of the new location as falls within the boundaries of lands appropriated for the canal, is in the state; as to all other portions of such lands, the title remains in the owner as before, subject to the public easement (*Higgins* agt. *Reynolds*, 81 N. Y. R. 151).
2. The title of the owner, subject to the easement, remains perfect, not only to the land covered by the highway, but also to all the material within its boundaries, except such as may be needed to build or maintain the road (*Id.*).
3. Where stone had been taken from the land for the purpose of constructing such road, before the land from which they were taken was covered by such location, the title to such material was in the owner of the land, and was not divested by a subsequent location of the road over the same land (*Id.*).
4. By the statutes of this state, the canal board is authorized to let the repairs upon any or all the sections of the canals of this state, to be made by contract, and the contractor is invested with the same general powers formerly given to superintendents of repairs, and the same general duties are imposed upon him: *Held*, that when the lock gates upon one of the sections so let by contract were defective and out of repair, of which notice had been given to the contractor, and in consequence of such defect the plaintiff's boat and its furniture, while passing through such gates were injured by the giving way thereof, the contractor was liable for the damage thus sustained (*Robinson* agt. *Chamberlain*, 34 N. Y. R. 389).

CAPITAL STOCK.

1. Defendant subscribed to the capital stock for the purpose of building a seminary, and delivered his subscription to the plaintiff—the seminary incorporation. The seminary buildings were built, and the defendant refused to pay his subscription. Suit was

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commenced by plaintiff to recover the same: *Held*, that the delivery of the subscription to the plaintiff, the demand of payment, and the subsequent suit to recover the same, were sufficient evidence of acceptance by the plaintiff: *Held, also*, that the obligation resting on the corporation to issue stock to the defendant to the amount of his subscription, and his consequent power to control the corporation to that extent, constituted a sufficient consideration for his promise to pay it (*Richmondville Seminary* agt. *McDonald*, 34 N. Y. R. 379).

CASE.

1. Where a case on appeal is proposed, and the respondent makes affidavit that the stenographer's notes taken on the trial (or a portion of them) are necessary to enable him properly to propose amendments to the case, the expense of procuring such notes is a proper item of taxation in the adjustment of costs at the general term. (*SUTHERLAND, J. dissenting.*) (*Sebley* agt. *Nichols*, ante, 182).

CAUSE OF ACTION.

1. Where the complaint alleged that "the defendant, contriving and wickedly and unjustly intending to injure the plaintiff, and to deprive him of the affections, comfort, fellowship, society and assistance of Rachel, his (plaintiff's) wife, did, at, &c., wrongfully and unlawfully purpose, plan and undertake, to alienate the affections of his (plaintiff's) said wife; and did then and there, for the accomplishment of such purpose" (by various professions and pretences set forth), "and by false insinuations against the plaintiff, and by other insidious wiles, to prejudice and poison the mind of the said Rachel against the plaintiff, and so far alienate her affections from her said husband, as to induce the said Rachel to desire and seek to obtain a divorce or separation from the said plaintiff; and that the defendant on or about the first day of February, 1866, did counsel, advise, aid and assist the said Rachel, in efforts to procure the commencement of proceedings for such divorce or separation, he, the defendant, well knowing that no cause or lawful ground existed for either a divorce or separation: And that the said defendant did, by the means aforesaid, so far prejudice and poison the mind, &c., of the said Rachel against the said plaintiff; and

did so far alienate her affections from the plaintiff, as to persuade and induce her to refuse to recognize or receive the plaintiff as her husband; and that on or about the 15th day of March, 1866, the said Rachel, acting under the wrongful and unlawful advice, influence and direction of the said defendant, did refuse to recognize or receive the plaintiff as her husband, or to live with him as his wife; and said Rachel has from thence hitherto, acting under the like advice, influence and direction of the said defendant, persisted in such refusal; and by means of the premises, the plaintiff has from thence hitherto, wholly lost and been deprived of the comfort, fellowship, society, aid and assistance of the said Rachel, his said wife, &c. Whereupon, the plaintiff demands judgment," &c.:

2. *Held*, on demurrer to the complaint, that the facts alleged constituted a cause of action, and a ground for damages (*Hermance* agt. *James*, ante, 142).
3. And the consequences of such alleged acts—the alienation of the affections of the plaintiff's wife, and her refusal to recognize the plaintiff as her husband, &c., constitute a cause of action, although there is no actual absence or separation, physically, by the wife from the plaintiff (*Id.*).
4. An action to recover damages for the fraudulent misapplication or conversion of property by an officer or agent of a banking association, is assignable; and the officer or agent may be arrested and held to bail, at the suit of the assignee (*Grocers' National Bank* agt. *Clark*, ante, 160).
5. The attribute of assignability is not confined to rights of action belonging to natural persons; it extends with equal effect to those belonging to artificial persons (*Id.*).
6. A cause of action for damages for injuries to real property by the negligence of the defendant, is necessarily local; and the courts of this state have not jurisdiction of such an action relating to real property without the state. But a cause of action for breach of a covenant to convey real property, is transitory; and if the courts of this state obtain jurisdiction of the parties, they can entertain jurisdiction of the action (*Mott* agt. *Oodington*, 1 Abb. N. S. 290).
7. Where lands are granted to a municipal corporation by the state, with a proviso giving a pre-emptive right to adjoining owners, the state only ca-

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re-enter for a breach of the proviso, by the act of the corporation in granting to one who is not the true owner of the adjacent upland; and until it does so, such a grant cannot be annulled in a collateral inquiry (*Twiss* agt. *Palmer*, 1 Abb. N. S. 81).

8. One whose goods are taken by the sheriff in proceedings of claim and delivery, in an action against a third person, can maintain an action against the sheriff for damages, notwithstanding his having given the sheriff notice of his claim under section 216 of the Code of Procedure, and subsequently having withdrawn it for the purpose of permitting the sheriff to deliver the goods (*Haskins* agt. *Kelly*, 1 Abb. N. S. 63).

9. Where an usurious loan is secured by a pledge, one who purchases the thing pledged from the borrower, and agrees to pay the debt, is not a borrower within the meaning of the statute of 1837,—which allows borrowers on usury to maintain actions for relief against their contracts, without paying or offering to pay the principal or interest. But in an action by the purchaser for relief from the usurious contract, the complaint should not be dismissed at trial merely because it does not contain an offer to pay what is equitably due, but he may have judgment for such relief, conditioned upon his making such payment, with costs (*Beecher* agt. *Ackerman*, 1 Abb. N. S. 141).

10. Where, after such a transaction, the purchaser of the securities obtains a further usurious loan from the same lender, giving one note for the total amount, and pledges other property to secure the whole, the property last pledged cannot be retained by the lender as security for the original loan. Where securities are delivered and accepted in payment of a usurious loan, with a guaranty by the debtor, of the payment of such securities the debtor cannot recover back the securities; but the guaranty is void, and he may compel the surrender of that (*Id.*).

11. An action will lie by a partner to enjoin an individual judgment creditor or the co-partner of the plaintiff, from selling upon execution the interest of the co-partner in the partnership assets, where it is made to appear by the complaint that the co-partner whose interest has been seized has no interest in fact in the assets, and the plaintiff offers to submit to an accounting to show this to be the case. *It seems,*

that since the abolition of the distinction between legal and equitable forms of procedure, the court out of which the execution was issued, should stay proceedings thereon under such circumstances, without putting the parties to an action (*Turner* agt. *Smith*, 1 Abb. N. S. 304).

12. An injunction will not lie at the suit of the owner of a wharf or bulkhead, having a mere easement in the nature of wharfage in respect to the land under water in front thereof, to prevent the erection of a pier or wharf by an adjoining owner, under the sanction of public authority. If injured by such erection, his remedy is by an action for damages for the obstruction of his easement; or, if he can show title to the land on which the erection is made, by an action to recover possession thereof (*Taylor* agt. *Brookman*, 1 Abb. N. S. 169).

13. Where the complaint alleged that the plaintiff and defendant had made an oral agreement to carry on the business of publishing books, to which the plaintiff was to contribute contracts with authors, &c., and was to give his personal attention for several years at a salary, and afterwards to have an interest in the business; and further alleged that under such agreement the defendant had become possessed of the stereotype plates of certain books, the right to publish which upon terms set forth in the complaint, was contributed by the plaintiff; but that the defendant refused to perform the agreement, or to form the business connection contemplated, although the plaintiff had been at all times ready and willing, and had offered to perform; and that the defendant was proceeding to publish such books in his own name, denying that the plaintiff had any interest therein, and refusing to surrender the plates and books, though the plaintiff had demanded them, and offered to indemnify him: *Held*, that these facts were sufficient to constitute a cause of action for a surrender of the books and plates, and an accounting (*Redfield* agt. *Middleton*, 1 Abb. N. S. 15).

14. An action, brought against an outgoing lessee, to recover the amount laid out in putting a house in repair, under a covenant on his part in the lease to leave the premises in good order, is an action upon the covenant, and not an action in tort (*Hatch* agt. *Wolfe*, 1 Abb. N. S. 77).

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CHARITABLE USES.

1. A bequest, by a New York testator, to such persons as the judges of another state may appoint after his death to receive it, is ineffectual for any purpose, if unlawful in the state of his domicil. Such a bequest to persons unknown, for the general purpose of founding, establishing and managing, in another state, an institution for the education of females, is void under the laws of New York (*Bascom* agt. *Albertson*, 34 N. Y. R. 584).
2. It has been the settled policy of this state to encourage donations and endowments for educational, religious and charitable purposes, by providing for the administration of such funds through organized and responsible agencies, sanctioned by legislative authority, and subject to legislative regulation and control. Such gifts, if otherwise valid, are upheld in our courts, when made to institutions or societies having authority by charter or by law to receive them, and when the purposes contemplated by the donors are within the range of the objects of such societies, and the scope of their general powers. The English system of indefinite charitable uses has no existence in this state, and no place in our system of jurisprudence (*Id*).
3. The authority which, prior to the statute of 43 Elizabeth, was exercised by the English Court of Chancery in respect to pious and charitable uses, as distinguished from other uses and trusts, was not a part of its original and inherent judicial power as an equity tribunal, but a branch of the jurisdiction it assumed to exercise, in virtue of the royal prerogative and the *cy pres* power, with which the courts of this state have not been invested. By the statute of 43 Elizabeth, various abuses of the previous system were remedied, and the law of indefinite charities was substantially codified; certain enumerated uses of this nature being sanctioned by parliamentary authority, and all not thus sanctioned being permitted to fail. The law abuses which grew up under this statute led to the adoption of further parliamentary restraints, in the mortmain act of 9 George II, ch. 36 (*Id*).
4. The design and effect of the repeal of the statute of Elizabeth and the mortmain acts, by the legislature of 1788, was to abrogate in this state the English law of indefinite charitable uses; and our subsequent legislation has supplied a complete and harmonious system of charities, sanctioned

by legislative authority, subject to statutory regulation, and adapted to the condition of our people and the nature of our institutions. There is nothing to withdraw gifts to mere private trustees, for indefinite charitable uses, from the operation of the provisions of the Revised Statutes in relation to uses and trusts, perpetuities and the limitation of future estates: and the prohibitions contained in these statutes are in direct contravention of the English law on this subject, as it existed at the time of the revolution, when our first Constitution was adopted. The cases of *The Baptist Association* agt. *Hart's Executors* 4 Wheat. 1; *Gallego's Executors* agt. *Attorney-General* (8 Leigh, 474); *Ayres* agt. *The Methodist Episcopal Church* (3 Sandf. 357); *Yates* agt. *Yates* (9 Barb. 845); and *Fountain* agt. *Ravenel* (17 How. U. S. 369), in accordance with these views, approved; the case of *The New York Protestant Episcopal School* (31 N. Y. 574), explained; and the cases of *Shotwell* agt. *Mott* (2 Sandf. Ch. 46), and *Williams* agt. *Williams* (4 Seld. 525), so far as they are inconsistent with these conclusions, overruled. (*Bascom* agt. *Albertson*, 34 N. Y. R. 584.)

CHARTER-PARTY.

1. Where necessities are purchased for the use of a vessel, by its master, and where the registry contains the names of the owners, with such person as master, such owners are *prima facie* liable for supplies, in the absence of any proof qualifying such master's authority (*Kenzel* agt. *Kirk*, *Court of Appeals*, ante, 269).
2. In such case it rests with the defendants to establish a defense (*Id*).
3. The proof that such vessel was "run on shares," is not of itself sufficient to discharge the owners from responsibility (*Id*).
4. The real question is, who by the charter party has *sole possession, command and navigation of the ship*? This is always a question of fact, depending on the peculiar circumstances of each case. In many cases "running on shares," is a method of determining the amount of the master's compensation as such (*Id*).
5. The numerous decisions reported from the courts of the eastern states on this subject, are based on the principle that the general owners are not liable, because they have let the *exclusive possession, command and naviga-*

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tion of the ship, not to one as agent, but for the time as owner. In such lettings, the doctrine of agency has no application (*Id.*).

6. The hirer then, in all contracts for supplies, acts for himself, and upon his own responsibility and credit (*Id.*).
7. In all such cases, the share of freights paid to the owners by the hirer, is to be regarded as their charter money for the use of the vessel (*Id.*).
8. But where the general owners say to the captain, "We will give you a gross sum per month," or, "We will give you one-half her gross earnings to sail her for us as captain, and you shall pay half of her disbursements, and find all her supplies," the owners are responsible for supplies to third persons ignorant of the arrangement, as in ordinary cases of masters purchasing supplies for vessels they command (*Id.*).
9. A contract to pay a broker five per cent commission for negotiating a charter of a vessel to the government, is not *per se* void on the ground that it contravenes public policy (*Howland* agt. *Coffin*, ante, 300).
10. It must appear that the parties intended to make use of, or to resort to corruption or improper influences to obtain the charter, or that the undertaking was injuriously to affect or subvert public interests (*Id.*).
11. We are not to presume anything wrong in a transaction in which the government is concerned, any more than where private individuals are concerned (*Id.*).
12. Where the defendants, owners of a steamboat, contracted to pay the plaintiff, a broker, five per cent on amount of charter, obtained by him from the government for such steamboat; that is to say, on \$200 per diem, "more or less, as long as she remains in government service." A reduction of the charter compensation from \$200 to \$120 per diem, without the consent or knowledge of the broker, by a simple indorsement on the charter party, without any other change in its provisions, the vessel continuing in the government employ, does not amount to a new charter, so as to deprive the broker of his right to compensation on the reduced amount. In such case, the identity of the instrument or the transaction is not affected by the indorsement, so as to deprive the broker of his compensation under the contract in suit. The vessel still, within the meaning of the contract, remained

in the government service under the original charter (*Id.*).

CHATTEL MORTGAGE.

1. It is the duty of the register to index a chattel mortgage duly filed with him; and his omission to do so cannot prejudice the lien of a mortgagee who has done all required of him to make the mortgage valid (*Dikeman* agt. *Puckhafer*, 1 Abb. N. S. 32).
2. Where the mortgagor of chattels borrows money to buy in the mortgage, and procures an assignment of it to the lender, as security for repayment of the loan, the mortgage becomes in the hands of the latter a mere pledge for the loan, and is discharged by a tender thereof (*Haskins* agt. *Kelly*, 1 Abb. N. S. 63).

CHEESE FACTORY ASSOCIATION.

1. An action to recover several penalties under chapter 361, of the laws of 1865, for bringing watered milk to a cheese factory, to be manufactured into cheese, may be maintained by and in the name of the treasurer of the association against a member of the association (*Bridenbecker* agt. *Hoard*, ante, 289).

CLAIM AND DELIVERY.

1. Where goods come rightfully into the defendant's possession, as a mere bailee in good faith, and they are subsequently wrongfully detained, it is necessary to allege a demand for their delivery, in an action for their wrongful detention (*Purves* agt. *Molz*, ante, 478).
2. Where goods come to the possession of a defendant by a mistake, of which he is aware at the time, and he subsequently, through voluntary repairs upon the same, claims a lien thereon, for which he detains the same, he is a wrong-doer from the beginning. Consequently, he is liable in an action for the wrongful taking and detention, and no demand for delivery is necessary to be alleged (*Id.*).
3. A requisition in proceedings of claim and delivery to recover possession of goods, in an action brought for the purpose, against one who purchased them at a wrongful sale, will justify the sheriff in taking them, although the defendant acted as an agent in the purchase, if the papers are served and the seizure made while the goods remain actually in his pos-

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session (*Haskins* agt. *Kelly*, 1 Abb. N. S. 68).

CLOUD ON TITLE.

1. An action to remove a cloud from title cannot be sustained, where it is apparent upon the face of the pleading, that the facts alleged, if true, would not legally affect the title of the plaintiff (*Farnham* agt. *Campbell*, 34 N. Y. R. 480).

COMMISSIONERS OF HIGHWAYS.

1. Where a board of trustees of an incorporated village are invested with authority "to exercise the powers and duties of commissioners of highways of towns, within the limits of the village, &c., so far as these powers and duties are consistent with other parts of the act, and are applicable to the village;" and there is no provision in the act requiring such board to notify proprietors to remove structures encroaching upon the streets of the village, it seems, such board may proceed to remove such structures, without giving sixty days notice, as is required of commissioners of highways (*Walker* agt. *Caywood*, 31 N. Y. R. 51).
2. The failure by the commissioners of highways to cause a public highway, long in use, to be opened to its full statute width for a period of thirty years, does not operate to extinguish the rights of the public to the parcels not so opened and worked. The statute requiring highways that have been laid out, to be opened and worked within six years, applies only to those cases where there has been a failure to open and work them at all, and not where the highway has been in full use for the whole time, though not in all places opened to its full width (*Id.*).

COMMISSION MERCHANTS.

1. Factors or commission merchants, doing business in the ordinary way, that is, receiving property from the consignors from time to time, and making sales and collections in their own names, placing the proceeds to their own credit in their bank account, charging their commissions and payments made on account of the property—making remittances to and accepting and paying drafts of the consignors, are not liable to arrest in an action for moneys neglected to be paid over to the consignors, on sales of their property (*Duguid* agt. *Edwards*, ante, 254).

2. Such factors and commission merchants do not act in a "fiduciary capacity," within the meaning of the Code (§ 179, sub. 2), but sustain the relation of debtor and creditor to their consignors (*Id.*).

COMMON CARRIERS.

1. Where goods are shipped, and must pass through the hands of several intermediate carriers, before arriving at the place of their destination, the duty of each intermediate carrier is to transport the goods safely to the end of his route, and deliver them to the next carrier on the route beyond. An intermediate carrier, in such case, does not relieve himself from liability by simply unloading the goods at the end of his route and storing them in his warehouse, without delivery or notice to, or any attempt to deliver to the next carrier (*McDonald* agt. *Western Railroad Corporation*, 34 N. Y. R. 497).
2. Common carriers of passengers, with their ordinary baggage, for hire, are liable for losses occurring from any accident to the baggage while it is in their keeping as carriers, except those arising from the act of God or the king's enemies. This strict accountability as carriers, terminates within a reasonable time after the arrival of the baggage at the place of destination, where the carrier is ready to deliver the same to the passenger, according to the terms of the contract. Where the passenger did not call for his trunk, but left it in the hands of the company overnight, without any arrangement with them, and the same was destroyed by the burning of the depot before morning: Held, that the company were not liable (*Roth* agt. *Buffalo and State Line Railroad Co.* 34 N. Y. R. 548).
3. Goods destined for S., a place beyond Dunkirk, but directed to F. at Dunkirk, were transported by the defendant upon its railroad from Buffalo to Dunkirk. On the day of their arrival at the latter place, the goods were called for by the carrier who was to carry them from Dunkirk to S. The defendant, owing to other engagements of its agent, was not ready to make the delivery when called for; and it was mutually agreed, for the convenience of both parties, that the goods should remain in the defendant's warehouse, where they were, until the next morning. During the night the warehouse took fire, by accident, and the goods were consumed:

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Held, that the liability of the defendant as a common carrier continued until the property should be actually delivered to the next carrier (*Fenner* agt. *The Buffalo and State Line Railroad Co.* 48 Barb. 103).

COMPLAINT.

1. In an action for the specific performance of an agreement to convey land, the rule is not as strict now as formerly, in reference to the proof of the exact agreement alleged in the complaint (*Lobdell* agt. *Lobdell*, ante, 1).
2. If the allegations of the cause of action are not unproved in their entire scope and meaning; and the variance is not material, and no one has been misled; and especially if no question of variance was raised at the trial, the objection taken on appeal that the agreement as set forth in the complaint is widely different from that found by the referee, will be disregarded (*Id.*).
3. Where there are several sections of a statute creating a cause of action, differing in their legal effect, and in the remedies provided, and the complaint in an action under the statute is so drawn that it may include claims under more than one provision, the plaintiff may be required, on motion, to make it more definite and certain in this respect. In an action to recover back money lost at play, the complaint is obnoxious to a motion that it be made more definite and certain, unless it states the facts necessary to show clearly under which of the several sections of the statute of betting and gaming, the action be brought (*Arrieta* agt. *Morrissey*, 1 Abb. N. S. 439).
4. A complaint seeking to set aside conveyances and other instruments affecting real property, on the ground that they were obtained by fraud, is not sustained by proof that they constitute a mortgage from which the plaintiff has a right to redeem. This is not a mere variance, but a failure to prove the cause of action in its entire scope and meaning (*Patterson* agt. *Patterson*, 1 Abb. N. S. 262).

See CAUSE OF ACTION, 1, 2, 8.

CONFIDENTIAL RELATION.

1. Where the justice at special term finds as facts that the assignee of certain bonds and mortgages, and donee of a certain check of the assignor, was the clerk of the attorneys, &c., of the assignor, and had charge of much of

the business of the assignor, &c., and was familiar with the extent and nature of her property, and enjoyed her confidence and esteem; and that the assignment was a gift, freely and voluntarily made by the assignor to the assignee, without any fraud, deceit or undue influence on the part of the assignee, or advantage taken by reason of his business relation, &c., the law will uphold the transaction. Where persons standing in confidential relations, make bargains with, or receive benefits from the person for whom they are counsel, &c., the transaction is to be scrutinized with the extreme vigilance, and regarded with the utmost jealousy. The presumption is against such a transaction; and the onus is upon the party seeking to establish the gift, &c. (*Per HUNT, J. Nesbitt* agt. *Lockman*, 34 N. Y. R. 167).

CONFESSION OF JUDGMENT.

1. A statement in effect that the defendant had purchased of the plaintiff a certain indebtedness (describing it), due to the plaintiff, for which he had given to the plaintiff the promissory notes (describing them), upon which, and for the amount of which, he confessed the judgment, is a sufficient statement to sustain such judgment. In such case, it is not necessary to set forth the consideration of the debt purchased. Where a judgment is confessed directly to a third party, who takes the same in good faith and for value, it cannot be impeached for fraud existing between the other parties. But if such third party take such judgment as collateral security only, after it has been confessed, &c., it would be otherwise (*Kirby* agt. *Fitzgerald*, 31 N. Y. R. 417).

COMPTROLLER OF BROOKLYN.

1. The comptroller of the city of Brooklyn, has not exclusive power over the financial concerns of the city (*People* agt. *Booth*, ante, 17).
2. The mayor is vested with a discretionary check, in respect to payments out of the city treasury; and it is his duty to take care that no money is drawn out of the treasury unless in pursuance of law (*Id.*).

CONSIDERATION.

1. The defendant, H. B., had executed his bond and mortgage for \$2,000, to A. B., which was afterward assigned

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by A. B., to T. E. B. and A. B., Jr. After the death of T. E. B., the mortgagor, H. B. procured the wife and son of T. E. B., to assign to him their interest in the said mortgage, upon the promise to pay them \$1,000 for said assignment. All the debts of T. E. B., were paid. In an action by the assignee of the wife and son to recover the \$1,000: *Held*, that the wife and son being the distributees of the estate of T. E. B., could sell the substantial interest in the mortgage, and that their assignment was a sufficient consideration for the promise to pay the \$1,000. *Also*, that the consideration passing between T. E. B. and A. B., upon the transfer of the mortgage to the former was immaterial, and could not be inquired into in the present action (*Gardner agt. Barden*, 84 N. Y. R. 433).

2. *Also*, That the declarations of T. E. B., or of the son, were not admissible in evidence against the present plaintiff. Such declarations were only admissible where the interests of the parties remain unchanged by the apparent transaction, and where an identity of interest exists between the assignor and the assignee: *Held, further*, that the assignment was valid and effectual, notwithstanding one object in making it was to enable the assignor to become a witness in the action. If it was the intent of the parties that the proceeds of the suit should be under the exclusive control of the assignee, the assignment was effectual: *Held, further*, that the case was fairly and properly submitted to the jury upon the facts, and that the comments of the judge on the evidence, are not a subject of exception (*Id.*).

CONSTITUTIONAL LAW.

1. The act creating the *Board of Health* in the city of New York is *not unconstitutional*: 1st. Because as alleged, conferring the right on the board to *deprive a citizen of his liberty and of his property*, without due process of law;
2. 2d. Because as alleged, conferring upon the board powers of *local legislation*, which, under the constitution can be conferred by the legislature only upon boards of supervisors, municipal corporations and incorporated villages;
3. 3d. Because as alleged, it confers upon the board *judicial powers*, in contravention of the sixth article of the constitution, which provides for and

limits the judicial department of the government (*Cooper agt. Schultz, ante*, 107).

4. Previous to the act of congress passed January 24, 1865, *attorneys and counsellors at law* were, under the second rule of the court, admitted to the bar of the supreme court of the United States, by presenting evidence to the court that they had been attorneys and counsellors at law for three previous years in the highest courts of the states to which they respectively belonged; and that their private and professional character appeared to be fair (*Matter of Garland, ante*, 241).
5. On the 24th of January, 1865, congress passed a supplementary act, making the provisions of a former act passed July 2d, 1862, applicable to attorneys and counsellors at law; by which last mentioned act they were required, before being admitted to the bar of the supreme court of the United States, to take and subscribe an additional oath;
6. *First*. That the deponent has never voluntarily borne arms against the United States since he has been a citizen thereof;
7. *Second*. That he has not voluntarily given aid, countenance, counsel or encouragement to persons engaged in armed hostility thereto;
8. *Third*. That he has never sought, accepted or attempted to exercise the functions of any office whatsoever, under any authority or pretended authority in hostility to the United States;
9. *Fourth*. That he has not yielded a voluntary support to any pretended government, authority, power or constitution within the United States, hostile or inimical thereto; and
10. *Fifth*. That he will support and defend the constitution of the United States against all enemies, foreign and domestic, and will bear true faith and allegiance to the same;
11. *Held, 1st*. That this statute, except the last clause, which is promissory only, is directed against parties who have offended in any of the particulars embraced by the above clauses, and its object is to exclude them from the profession of the law, or at least from its practice in the courts of the United States (*Id.*).
12. 2d. As the oath prescribed cannot be taken by these parties, the act as against them operates as a legislative decree of perpetual exclusion (*Id.*).

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13. *3d.* An exclusion from any of the professions or any of the ordinary avocations of life for past conduct, can be regarded in no other light than as a punishment for such conduct (*Id.*).
14. *4th.* The exaction of the oath is the mode provided for ascertaining the parties upon whom the act is intended to operate, and instead of lessening, increases its objectionable character (*Id.*).
15. *5th.* All enactments of this kind partake of the nature of bills of pains and penalties, and are subject to the constitutional inhibition against the passage of bills of attainder, under which general designation they are included (*Id.*).
16. And *6th.* In the exclusion which the statute adjudges, it imposes a punishment for some of the acts specified, which were not punishable, or may not have been punishable at the time they were committed; and for all the acts it adds a new punishment to that then prescribed, and it is thus brought within the further inhibition of the constitution against the passage of an *ex post facto* law (*Id.*).
17. *Held,*, further, that the effect of the pardon by the President, of the petitioner, is to relieve him from all penalties and disabilities attached to the offense committed by his participation in the rebellion, so far as that offense is concerned. He is thus placed beyond the reach of punishment of any kind. And it is not within the constitutional power of congress to inflict punishment beyond the reach of executive clemency (*Id.*).
18. From the petitioner, therefore, the oath required by the act of January 24th, 1865, cannot be exacted. The prayer of the petitioner must be granted, and the amendment to the second rule of the court, which requires the oath prescribed by the act of January 24, 1865, having been unadvisedly adopted, must be rescinded (*Id.*).
19. The act of 1859 (ch. 392), subjecting certain lands devised by John Baker, in 1796, in trust for the maintenance of the charity scholars, &c., under the management of Trinity Church, in the city of New York, to local legislation, &c., is constitutional and valid. *It seems,* that the legislature have power to regulate and change the forms of proceedings in all cases where no vested rights have been acquired under existing laws. The act of 1806, vesting the remainder of the estate devised by John Baker, &c., in the school corporation, according to the intent of said act, is constitutional and valid (*In the matter of the Petition of the Trustees of the New York Protestant Episcopal Public School, on the application of Charles H. Davis, Jr., Joseph Beeseley, Robert Somerville, James B. Warden, 31 N. Y. R. 574.*).
20. The act of the legislature, passed March 24, 1865, entitled "An act to amend chapter 389 of the laws of 1861," is not unconstitutional and void as being intended to modify and impair the contract between the city of Rochester and the Rochester and Genesee Valley Railroad Company, by which the city became a stockholder in the railroad company upon the acceptance of its subscription by the company, and therefore included in the section of the constitution of the United States which prohibits any state from passing any law impairing the obligation of contracts (*The People ex rel McConvill agt. Hills, 48 Barb. 340.*).
21. The act of 1851 (*Laws of 1851, ch. 181*) enabled the city of Rochester to subscribe for and hold stock in the Rochester and Genesee Valley Railroad Company, to an amount not exceeding \$300,000; and in case the company should elect to receive their subscription, the common council was authorized to nominate and appoint one director of said company for every \$75,000 of capital stock of the company held by the city. The act of March 24, 1865, amended the act of 1851 so as to authorize the common council of Rochester to nominate and appoint one director of the railroad company for every \$42,855.57ths of capital stock held by the city; the effect of which was to give to the city of Rochester the right to choose seven instead of four directors of the company: *Held,* that the act of 1865 was not void as impairing, or having a tendency to impair, the obligation of a contract. *Held, also,* that under the section of the Revised Statutes declaring that the charters of corporations thereafter to be granted by the legislature "shall be subject to alteration, suspension and repeal, in the discretion of the legislature," and the corresponding provision of the general railroad act, the legislature had the power to make the change specified, in the charter of the railroad company. *Held, further,* that the power thus reserved was intended to be continuous, and was not limited to a single occasion, or any number of occasions, of its exercise, and then to become or be deemed exhausted (*Id.*).

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22. The act of the legislature, of March 24, 1865, entitled "An act to amend chapter 389 of the Laws of 1851," is not void for non-compliance with section 16 of article 3 of the constitution of this state, which declares that "no private or local bill, which may be passed by the legislature, shall embrace more than one subject, and that shall be expressed in the title." And this, notwithstanding the statement in the title fails to indicate the nature of the amendment intended to be made, or what section or portion of the act to be amended is intended to be affected. The constitutional provision does not require that the titles of acts of the legislature shall contain the substance of their enactments. If the titles are sufficient to put the legislature and persons intended upon inquiry, that is all the constitution requires (*Id*).

See LOTTERIES.

CONSTRUCTION.

1. In the construction of a writing, the meaning of particular terms used, as "general opposition," may be sought for in the light of concomitant circumstances. Where the "general opposition" to be made, had for its object the defeating of an improvement in the city of New York, under the act of April 20, 1839. (*chap. 209*), and was to be resisted by a majority of the parties interested, &c., to be a successful opposition, the term "general opposition," would not embrace any litigation which was peculiar to any one or more of the essential parties, less than the whole (*Dodge agt. Gardner*, 31 N. Y. R. 239).
2. Where one of the resisting parties signs a paper to pay any amount within a specified sum, toward raising a larger sum as a fund to prosecute such "general opposition," and no further sum or sums are contributed toward such fund the contract of the party does not become operative, unless the contemplated fund is raised (*Id*).
3. Where, upon an agreement to sell and deliver a quantity of hops, the vendee agrees to advance \$125 to pay pickers, and at the same time advances to the vendor that amount, and takes his note for the same, payable one day after the date thereof, the transactions may be treated as one and the same, and the note may be deemed a receipt for the money advanced (*Smith agt. Rowley*, 34 N. Y. R. 367).

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CONSTRUCTIVE NOTICE.

1. The facts that a negotiable note is payable to an insurance company, and is indorsed by its president, and presented for discount only three days before its maturity, are not of a character to require the party discounting such note, to make inquiries into the manner in which the party presenting it for discount obtained it, when notes of the like character and indorsement have frequently been discounted in the like manner, for the benefit of the insurance company (*Marine Bank, &c. agt. Clements*, 31 N. Y. R. 33).

CONTEMPT.

1. The supreme court, by virtue of its general inherent powers, has jurisdiction and authority, to a certain extent, not only over parties before it, but over its judgments, decrees and orders, also (*Barton agt. Butts. ante*, 456).
2. Under these general powers, it may vacate and set aside orders taken by default, or those irregularly or improvidently made; judgments taken by default, or irregularly entered; and stay the further prosecution of any action after the plaintiff has accepted payment of his claim, during its pendency, or obtained satisfaction thereof by means of some other remedy (*Id*).
3. Where a party has been arrested upon an attachment for contempt, and has given a bond with sureties, for his appearance at court, to abide the order of the court, and has been adjudged to have been guilty of the misconduct alleged, and punishment by fine and imprisonment ordered, the statute does not authorize the bond to be prosecuted at the same time that a warrant of commitment is issued against the party. It is not the policy of the statute to give the aggrieved party two final and complete remedies for the same offence (*Id*).

CONTRACT.

1. The ticket issued to a passenger for his passage from New York to San Francisco, does not preclude the party from showing by parol testimony, a contract for such transportation. And though two tickets—one from New York to Chagres, in one steamer, and one from Panama to San Francisco in another—be issued, it does not show thereby more than one contract of transportation from New York

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to San Francisco (*Roberts* agt. *Van Buskirk*, 31 N. Y. R. 661).

2. A party being a part owner of the line of steamers from New York to San Francisco, can bind himself as principal in a contract for the transportation of passengers over such line, and such contract may be proved by circumstances, notwithstanding the passenger received separate tickets for separate vehicles in the line. A contract, independent of that expressed in the ticket, may be proved and submitted to the jury (*Id*).
3. The party contracting for the transportation of passengers, is liable for damages arising from unreasonable delay along the route, occasioned by the fault or neglect of those legitimately engaged in the line of transportation. Thus, a party who has engaged transportation over the line from New York to San Francisco, and who is unreasonably detained at Panama by the default of the transportation company, and is thereby specially damaged, as by sickness, loss of journey, &c., may maintain his action for damages consequentially sustained (*Id*).
4. Where the plaintiff entered into a contract with the defendant "to make the plans, elevations, sections and specifications," of a dwelling house intended to be erected by him, and to "superintend the progress" of the building, and where the mason had also a separate contract with the defendant "well and sufficiently to erect and finish the building, agreeably to drawings and specifications," made by the plaintiff, and where the mason agreed also "to lay out his work himself," and there was a defect in the building, in that the balcony in front and the front parlor windows were two and three-quarter inches higher from the parlor floor than was shown upon the plans, and the same distance higher from the floor than the back parlor windows, and where it was proved the plaintiff had diligently superintended the progress of the work: *Held*, that such defects are not chargeable upon the plaintiff, and formed no ground for withholding payment of the amount agreed to be paid for his services as such architect: *Held*, further, that the judgment of the general term, overruling the decision of the referee in favor of the claim of the architect, was erroneous, and should be reversed (*Petersen* agt. *Rawson*, 34 N. Y. R. 370).
5. The circumstance that the defendant paid his masons the balance due to

them for their work, when he could have withheld the same until they presented a certificate from the plaintiff, which he refused to give, held unimportant. The defendant might select his remedy against either party, as by law entitled; and the neglect of the one, or payment to him, would constitute no defense to the party prosecuted. The statement of the facts on this branch of the case, held not to interfere with the judgment of the referee, as his judgment is not based upon such a theory (*Id*).

See AGREEMENT.

See CHARTER PARTY.

COPY-RIGHT.

1. The photographing a copy-right engraving, is an infringement of the copy-right laws of the United States (*Act* of 1831, §§ 1, 7), and will be restrained by injunction (*Rossiter* agt. *Hall*, ante, 226).

CORPORATION.

1. Spurious stock, attempted to be created in excess of the legal capital of an incorporated company, forms no part of the capital stock, and is void. A corporation is liable to the same extent, and under the same circumstances, as a natural person, for the consequences of its wrongful acts or omissions. A corporation is responsible for the acts and for the negligence of its agents, while engaged in the business of their agency, to the same extent, and under the same circumstances, as natural persons (*New York and New Haven Railroad Company* agt. *Schuyler et al.* 34 N. Y. R. 30).
2. Where the stock of a corporation is, by the terms of its charter or by-laws, transferable only on its books, the purchaser receiving a certificate with power of attorney, &c., gets the entire interest of the seller, with all his rights. Such purchaser, neglecting to have the transfer made on the books of the corporation until after such stock is transferred to a *bona fide* holder, without notice, loses his right to demand and have the transfer thereof made to him. But the corporation would be liable to the holder of such certificate for permitting the stock to which he was entitled, to be transferred to another, &c., because they had constructive notice of these outstanding certificates. All duties imposed by law upon a corporation, raise an implied law of performance, &c (*Id*).

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3. There is no express provision of the statute, giving to the court the power to suspend all the business and operations of a corporation for an indefinite period, by the appointment of a receiver. And the general principle is, that a court of equity has no visitorial power over corporations, except such as may be expressly conferred on it by statute (*Latimer* agt. *Eddy*, 46 Barb. 61).

4. It is a general principle that a cause of forfeiture cannot be taken advantage of or enforced, against a corporation collaterally or incidentally, or in any other mode than by a direct proceeding for that purpose against the corporation, so that it may have an opportunity to answer (*Towar* agt. *Hale*, 46 Barb. 361).

5. Where all the capital stock of a corporation is subscribed for and taken, at the time the articles of incorporation are filed, and the certificate of incorporation, made and filed as required by law, specifies the names of all the stockholders, no subsequent subscribers, by merely writing their names in the corporation book, and affixing a number of shares to their respective names, can acquire a right to any shares of stock, or become by such an act stockholders of the corporation, and liable as such for its debts (*Latthrop* agt. *Kneeland*, 46 Barb. 432).

6. When the stock in a corporation is once all taken, the corporation has no more at its disposal, unless it shall get back a portion of that so taken, by forfeiture; and no person can become a stockholder, except by purchase from one of the original subscribers or his assignee, and by assignment of stock. A corporation cannot increase its capital stock at will, in any manner, or to any extent, unless it is authorized to increase the same by its charter, and then only in the manner prescribed. (*Per JOHNSON, J.*) (*Id.*)

7. Where, in an action by creditors of a corporation against T., seeking to charge him with the debt, as being a stockholder of the corporation, it appeared from the evidence that all the capital stock was taken nearly two years before the subscription by T. was made, and there was no evidence of any forfeiture of any stock so taken originally, or of any transfer to T. of stock, or increase of capital: *Held*, that there being no evidence to show that he ever held any stock, or that the right to any ever vested in him, the mere fact that he had subscribed for stock in the book of the corpora-

tion, and given his note for the amount, was not sufficient to render him liable as a stockholder, for the debts of the corporation: *Held, also*, that T. was not estopped by the subscription of his name upon the corporation book, from denying that he was a stockholder (*Id.*).

COSTS.

1. A sheriff on succeeding in his defense to an action, is entitled to double disbursements, as well as double costs (*Jackson* agt. *Lynch, ante*, 93).

2. In an action for the foreclosure of a mortgage, where there was a part of the principal sum not yet due, the amount of which was admitted by the pleadings, and the mortgagor—one of the defendants, with his answer, served an offer to allow judgment to be entered herein against him, decreeing due on the bond and mortgage mentioned in the complaint, the sum of \$105, and interest thereon from this date, and for judgment of foreclosure and sale herein, with costs, which offer was not accepted by the plaintiff, and on a reference it was ascertained that at the time of the offer there was but \$68 due on the bond and mortgage:

3. *Held*, that the plaintiff was entitled to costs, notwithstanding the offer. (*MARVIN, J. dissented.*) (*Bettis* agt. *Goodwell, ante*, 137).

4. Where a case on appeal is proposed, and the respondent makes affidavit that the stenographer's notes taken on the trial (or a portion of them), are necessary to enable him properly to propose amendments to the case, the expense of procuring such notes is a proper item of taxation in the adjustment of costs at the general term. (*SUTHERLAND, J. dissenting.*) (*Sebley* agt. *Nichols, ante*, 182.)

5. On an appeal from an order of an inferior court to the supreme court, the costs are not limited to ten dollars, but are governed by subdivision 5, of section 807 of the Code, and follow as a matter of right, the same as on an appeal from a judgment (*Williams* agt. *Murray, ante*, 187).

6. But where the court inadvertently fixed the costs at ten dollars in the order of affirmance, it was held to be irregular for the clerk to tax the full costs in disregard of the order. Application should have been made to the court to correct the order (*Id.*).

7. In an action of tort to recover damages, brought in a justice's court, and

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judgment for a certain sum is rendered for the plaintiff, and the defendant appeals to the county court, specifying in his notice of appeal certain objections to the recovery of the judgment, but no offer to reduce the amount is served by the plaintiff, and on a trial in the county court the plaintiff recovers a larger amount than before the justice, but not sufficient to equal the amount of interest on the first judgment, from the time of its recovery, the plaintiff, nevertheless, recovers a more favorable judgment, and is entitled to costs (*Smith* agt. *May*, ante, 222).

8. Interest not being a necessary and legal incident to a claim of tort, the comparison of the two judgments should not be affected by it (*Id.*).
9. When it may be charged upon the estate in case of contesting a will (*Clapp* agt. *Fullerton*, 34 N. Y. R. 190).
10. Order granting or refusing extra allowance of costs, not appealable (*Clark* agt. *City of Rochester*, 34 N. Y. R. 355).
11. An agent for the collection of negotiable paper, who fails to take the necessary steps to charge the indorsers thereof, is not liable to the owner for the costs of an unsuccessful suit by the latter against the indorsers, unless by some misrepresentation or other act, he induced the bringing of such suit (*Ayrault* agt. *The Pacific Bank*, 1 Abb. N. S. 381).
12. Where the amount of an offer made under section 885 of the Code, exceeds with interest to the date of the judgment, the amount of the judgment actually recovered, the latter, though larger than the actual offer, is not "a more favorable judgment," within the meaning of that section, and does not carry costs (*Tilman* agt. *Keane*, 1 Abb. N. S. 23).

See MOTION, 1, 2.

CONVERSION.

1. Where the assumption of dominion over property is in hostility to the rights of the true owner, such assumption amounts, in law, to a conversion. Where the defendant received a number of firkins of butter, a part of which he was notified belonged to the plaintiff, but notwithstanding he shipped them all as his own, such act amounted to a conversion for which he is liable. To maintain an action for the wrongful conversion of property, it is enough that the rightful

owner has been deprived of it by the unauthorized act of another assuming dominion over it. (*Boyce* agt. *Brockway*, 31 N. Y. R. 490).

2. In an action to recover damages for the unlawful conversion of property, the plaintiff is entitled to recover the highest value thereof at any time between the conversion and the day of trial (*Morgan* agt. *Gregg*, 46 Barb. 183).

COUNTY JUDGE.

1. The omission of the county judge to designate, under the laws of 1851 (ch. 444), at what terms of the sessions a grand or petit jury shall be required to attend, does not deprive the court of its authority, as such, to impanel a grand jury at any of its terms. The law of 1851 (ch. 444) is so framed that, in the absence of a designation of any terms to be held without a jury, the general provisions of law respecting the drawing and summoning of juries will take effect, and will require a jury to be drawn and summoned at every term (*See Laws of 1847, ch. 280, § 42*). (*Cyphers* agt. *The People*, 31 N. Y. R. 373.)

COVENANTS.

1. Defendant, upon a valid consideration, had agreed to assign to plaintiff a certain lease which he held of certain premises, on the first day of April, 1853, and to make a perfect title to said premises. On the 19th of the previous May, the defendant had executed two separate leases for portions of said premises for the term of six years. On the first day of April, pursuant to agreement, the parties met and executed their several agreements; the defendant executing the assignment of his lease for the premises, and also assigning to the plaintiff the two leases of May 19, 1852, which the plaintiff accepted and notified the lessees thereof of his rights; the defendant, at the same time, covenanted that the said assigned premises were free and clear of and from all former and other gifts, grants, bargains, sales, leases, judgments, executions, back rents, taxes, assessments and incumbrances whatsoever, subject to the covenants of the lease. Subsequently the plaintiff sued the defendant for a breach of his covenant on the ground of the outstanding leases of May 19, 1852, assigned by defendant to plaintiff, as above stated: *Held by the court*, that the existence of the leases of May 19, 1852, which were transferred to the

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plaintiff by the defendant at the time of making such covenant, did not constitute a breach of such covenant; that the conduct of the plaintiff, at the time of the making of such covenant by the defendant, in receiving such assignments of said outstanding leases, and notifying the lessees thereof of his ownership, was sufficient evidence that the leases of May 19, 1852, were not considered by the parties, at the time, as being within the defendant's covenant (*Pease* agt. *Christ*, 81 N. Y. R. 141).

2. Where a large number of lots are embraced in the same conveyance containing general covenants of warranty, and, by arrangement, separate and distinct mortgages are given for the purchase money upon separate lots of the land conveyed, the covenants are thereby distributed to the several lots conveyed, and are to be construed as though each parcel had been conveyed for the sum expressed in the mortgage (*Johnson* agt. *Blydenburgh*, 81 N. Y. R. 427).

CREDITOR.

1. A judgment creditor, having levied his execution upon chattels of the debtor, has a claim superior to another creditor who has only obtained an order for the examination of the debtor in proceedings supplementary to execution. Where a judgment creditor is pursuing his legal remedy by execution, something more than a notice, or a *lis pendens*, is required to prejudice his levy (*Becker* agt. *Torrance*, 81 N. Y. R. 631).

CRIMINAL LAW.

1. It is a rule that *time and place*, when and where the crime was committed, must be stated with certainty in the indictment; but it is not necessary to *prove them on the trial as stated*, unless they are necessary ingredients in the offense (*People* agt. *Stocking*, ante, 48).
2. The general term of the supreme court has the power to fix a day for the execution of a prisoner, although he has been tried, convicted and sentenced in the court of general sessions, upon the affirmance of that judgment on appeal (*People* agt. *Ferris*, *Court of Appeals*, ante, 411).
3. The act of April 18, 1859, which says, upon the affirmance of a judgment in a capital case, it shall remit the record to the court from which it came, is not applicable to a case where the rec-

ord is removed from the supreme court to the court of appeals (*Id*).

4. Upon the affirmance of a judgment in the court of appeals, and the record is remitted to the supreme court, it is the duty of that court to follow the directions of the appellate court (*Id*).
5. When prisoners are jointly indicted, and they elect to have separate trials, it has always been allowed to the district attorney to determine which of them he will first put upon his trial. It is purely a matter of discretion with him, and his discretion will not be interfered with by the court. And a refusal thus to interfere forms no ground of exception. On the trial of a criminal case, the prisoner cannot be examined as a witness for himself; nor can one jointly indicted with him be examined as a witness in his behalf. The common law rule always excluded co-defendants from testifying for each other; and the relaxation of the rule, as to such parties, and in respect to the defendant himself, effected by section 399 of the Code, applies only to civil actions (*Patterson* agt. *The People*, 46 Barb. 625).
6. Every man must be held accountable for the consequences of his acts consciously and deliberately performed; unless he can show that he is in that condition which stamps him as an irresponsible being. Accordingly held, that an offer to show the mental grade and capacity of the prisoner, which offer was made not for the purpose of proving him to be *non compos mentis*, but to show the measure of his intellectual capacity, was rightly rejected. The provision of the Revised Statutes relative to justifiable homicide, as justly interpreted in the case of *Shorter* agt. *The People* (2 N. Y. R. 193), is that one who is without fault himself, when attacked by another, may kill his assailant, if the circumstances be such as to furnish reasonable ground for apprehending a design to take his life, or to do him some great personal injury, and there is imminent danger that such design will be accomplished; and this is so although it may afterwards turn out that the appearances were false, and there was in fact no such design, and no danger of its accomplishment (*Id*).
7. Where a remark of a judge, in refusing to charge as requested, though erroneous, does no harm, because it was a mere abstraction, having nothing to do with the matter in hand, it will afford no ground for reversing the judgment, or granting a new trial.

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The rule on this subject is the same in criminal as in civil cases (*Id.*).

8. Where, on a trial for murder, the killing is proved and conceded, and there is no doubt as to the identity of the prisoner, it is for him, in making out a justification for the act, to satisfy the jury, beyond reasonable doubt, that he did apprehend, and had reason to apprehend, that he was in imminent danger of his life, or of the infliction of some great personal injury. It would be reversing the whole order of the trial, and the burden of the proof, if it devolved upon the people not only to prove the killing, but to negative any possible defense that the statute or common law affords to an alleged offender charged with crime. (*Per* BACON, P. J.) (*Id.*)

9. The judge was requested to charge the jury that if they, upon the evidence, entertained a reasonable doubt as to whether or not the prisoner had reason to apprehend personal injury, they should acquit. The judge declined to put the proposition in that form, stating the rule to be that the jury were to be satisfied beyond a reasonable doubt, that the prisoner had reasonable ground to believe himself in danger: *Held*, not erroneous (*Id.*).

See SUPERVISORS, 2, 3, 4, 5.

DAMAGES.

1. In an action by the tenant for life, for damages to the estate, it is error to estimate the value of his estate by the present value of the rents and profits multiplied by the number of years' probable duration of his life without any deduction for annual charges, or rebate of interest for the time allowed. (*N. Y. Superior Court, Sp. Term, 1866, Greer agt. The Mayor, &c., of New York, 1 Abb. N. S. 206.*)

DEBTOR AND CREDITOR.

1. Where a person who is insolvent at the time, transfers his interest in a legacy, for an inadequate consideration, to a party who is aware of his insolvency, the creditors of the assignor may maintain a suit in equity to have their debts satisfied out of the interest or fund beyond the consideration actually paid or agreed to be paid; even though the transaction was not in fact fraudulent, so as to authorize the court to set it aside on that ground. In such a case the assignor, in the absence of any fraudulent design in making the transfer,

may obtain the same relief himself by showing that it was made under the pressure of his debts, or other importunate needs. And certainly equity should regard with quite as much favor the claims of his creditors; especially in a case where it appears that he intended to defraud them by a cheap transfer of his estate (*Bigelow agt. Ayrault, 46 Barb. 143.*)

2. Where the assignees of a lessee leased the premises for the best price they could obtain, and paid to the landlord all that they received, which was accepted by him, and they surrendered the possession: *Held*, that the assignees, having fully administered and paid out according to the terms of the assignment all the moneys they had received from the assigned estate, could, at most, only be charged personally with the value of the use and occupation of the premises; and that evidence to determine that value should have been received. PECKHAM, J. dissented (*Jermain agt. Pattison, 46 Barb. 9.*)

3. The liability of assignees under an assignment for the benefit of creditors, is to be determined by the same rule which applies to executors, under similar circumstances, *it seems* (*Id.*)

4. What the assignors did, before they made the assignment, in contemplation of making it, is evidence upon the question of their intention in making it, proper for the consideration of the jury. The rule is well settled, that where the validity of a sale or assignment of goods depends upon whether it was made with intent to hinder, delay or defraud creditors, the judge is bound to submit the case to the jury (*Peck agt. Crouse, 46 Barb. 151.*)

DECLARATIONS AND ADMISSIONS.

1. Declarations of the assignors of goods made subsequent to the assignment, and after they have parted with the possession of the assigned property, are not competent evidence for parties sued by the assignees for taking and selling the goods under and by virtue of a judgment and execution against the assignors. Declarations or admissions respecting the assigned property, thus made, by the assignors, after they have ceased to have any control over the goods, are not a part of the *res gesta*, but only mere hearsay, and, therefore, are not competent evidence against the assignees, or the

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creditors whom they represent (*Peck* agt. *Crouse*, 46 *Barb.* 151).

2. Where the declarations or admissions relate to the intentions of the assignors—the secret operations of their minds—and not to anything they said to the assignees, the fact that one of the assignees was present and heard the declarations or admissions without denying their truth, will not make them binding upon the assignees, or evidence against them (*Id.*).

3. The admissions or declarations of parties are competent evidence against them when parol evidence of the fact sought to be shown by such admissions or declarations, would be competent. The declarations of a person in the possession of lands, as to his title, are admissible evidence against persons claiming under him, who subsequently came into possession of the land (*Keator* agt. *Dimmick*, 46 *Barb.* 158).

4. The rule that parol declarations of a person having title to land, are inadmissible as evidence to defeat that title, only excludes declarations when the fact sought by them cannot be proved by parol evidence. The declarations of the grantee in a deed, in respect to the time when the deed was delivered to him, made while he was in possession of the farm conveyed, are competent evidence, in an action of ejectment for dower, against a person claiming title to the land under such grantee (*Id.*).

DEED.

1. When a deed has been delivered, so as to divest the grantor of the title, and vest it in the grantee, the subsequent destruction of it by the parties will not change the title back to the grantor, and re-invest him with it. It is well settled, that a condition in a conveyance, can only be reserved for the benefit of the grantor of the estate, and his heirs; and that no stranger can take advantage of the breach of a condition (*Fonda* agt. *Sage*, 46 *Barb.* 109).

2. Until re-entry by the grantor or his heirs, for a breach of a condition, the estate is not forfeited, but remains in the grantee. Mere neglect to perform the condition, is not sufficient to work a forfeiture. Nor is a mere verbal refusal by the grantee to perform the condition, if he is an infant at the time. To constitute a delivery of a deed, so that it shall become effectual to transfer title to real estate from one

to another, there must be an acceptance by the person to whom it is made. Acceptance by the grantee is an essential part of a delivery, in law (*Id.*).

3. Where a deed or other instrument is handed over by the maker to the other party, and retained by the latter, and nothing further is said, the law presumes that the instrument is made according to the agreement, and that the party to whom it is thus handed over, accepts it as a delivery, in fulfillment of the agreement between them. But it is not every mere handing over and retention for a greater or less period of time which will constitute a full and effectual delivery of an instrument. If it is taken by the grantee or other party merely for the purpose of examination, to see whether it is in accordance with the agreement, it is no delivery, unless the party concludes to retain it, after such examination (*Id.*).

4. And so, where a party makes a purchase of land, and the agreement is that the vendor is to convey it to the purchaser, by a deed with some special provision in it, and a deed is made and handed over to such purchaser, which conveys the land to another person, and the purchaser receives it without any examination of its contents, understanding and believing that it is a deed made to him, and which vests the title in him, and he retains it in that belief, until he discovers that it is not such an instrument as he was to have, and does not give him the land which he had purchased and paid for, he may return it to the vendor, and require one to be made in accordance with the agreement. No valid and effectual delivery has been made in such a case, and upon the discovery of the mistake or error within a reasonable time, and before any other rights have intervened, founded upon the instrument as made and thus retained, the party receiving it may refuse to retain it, and may return it and demand one in accordance with the agreement (*Id.*).

5. By a deed of conveyance, executed by N. V. K. to J. K., dated May 10, 1828, the grantor conveyed all his estate, both real and personal to the grantee, upon trust, to dispose of, lease and manage the trust estate, to collect and receive the rents, issues and income thereof, and after deducting expenses, to apply from time to time, so much of the residue of the rents, issues and income, to the use and support of the grantor and his family, if he should at any time marry and have a family,

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- during the life of the grantor, and to invest the overplus, if any, for the benefit of the heirs of N. V. K.; and upon the further trust that upon the death of the grantor, the trustee should account for what should remain of the estate, and the rents, issues and income thereof, to the "heirs at law and next of kin" of the grantor, "in the manner and proportions prescribed by the statutes of descent and distribution in this state in cases of persons who die intestate." After the execution of this trust deed, N. V. K., the grantor, married the plaintiff, and died leaving her and two children him surviving: *Held*, that the widow was not entitled, under the provisions of the trust deed, to dower in the real estate of the grantor. But that she was entitled to one-third of the personal estate, and the children of the grantor to the remaining two-thirds (*Knickerbacker* agt. *Seymour*, 46 Barb. 198).
6. If a consideration is expressed in a conveyance, no proof of its actual payment need be given; and though the amount be merely nominal, that is sufficient. Though an original purchaser is affected with notice of a prior deed, yet if he conveys to another without notice, the latter is as much protected as if no notice to either had been given. The actual possession of premises, which is to operate as constructive notice, must be visible and open, and not a mere constructive possession (*Webster* agt. *Van Steenberg*, 46 Barb. 211).
7. A mere allusion in a deed to premises as being "the same on which mining operations have been performed, heretofore," is not a notice that any other person is the owner; nor is it calculated to put the grantee on inquiry as to any previous unrecorded conveyance. Where, at the time a deed was executed, an individual was in possession of the premises, as a tenant, under a third person, who claimed the same adversely; and such tenant was occupying a log house thereon, and paying rent, and he had been there over eleven years: *Held*, that the deed was void under the statute, and conveyed no title to the grantee. And that the grantee having no title, he could convey none to another (*Id*).
8. Where the owner of land conveys the same by an absolute conveyance, wine plants, set in the ground and growing there at the time, will pass by the conveyance, notwithstanding a parol reservation thereof, by the grantor. In September, 1863, S. being in possession of land as tenant of W., under a lease that would not expire until April, 1865, had growing there certain wine plants, which he had set out in June, 1863. He purchased the premises of W., and took a conveyance thereof, in said month of September, at the request of L., and for his benefit, and upon the understanding that he was to occupy the farm as L.'s tenant, until April, 1864. He paid W. a part of the purchase money, which L. had furnished for that purpose, and gave a mortgage on the land to secure the balance. S. then executed a deed of the land to L., subject to the payment of the mortgage: *Held*, that the effect of the agreement, and of S. purchasing the farm from W., and conveying it to L., was to make S. the tenant of L., instead of the tenant of W., from the date of such conveyance, until April, 1864 (*Wintermute* agt. *Light*, 46 Barb. 278).
9. That S. having set out the wine plants as tenant, his change of landlords did not divest him of his title to the same. And that the fact that the legal title to the farm passed through him, in changing his landlords, did not alter his rights as tenant; because of the agreement, by which it was stipulated that he should remain a tenant: *Held*, also, that the facts of the case did not justify the admission of evidence to vary the effect of the deed from S. to L., by showing that at the time such deed was executed or delivered, S. made a parol reservation of the wine plants (*Id*).
10. The parties named in a deed of conveyance as grantees, were described in the introductory part of the deed as follows: "L. R., J. R., and M. M., trustees of the Methodist society, and to their successors, of the town of L., &c., of the second part." The grant was to the parties of the second part, and to their heirs and assigns forever. The *habendum* clause was in the following words; "To have and to hold the said premises above described, to the said parties of the second part, their heirs and assigns, to the sole and only proper use, benefit and behoof of the said parties of the second part, their heirs and assigns forever." And the covenants of seisin and for quiet enjoyment, were by the grantors to and with the said parties of the second part, their heirs and assigns: *Held*, that the deed conveyed the absolute title to the three individuals named therein as grantees. And that the addition to their names, in the statement of the parties, of "trustees of the Methodist society, and their suc-

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cessors," in the absence of proof of the existence of a legally organized religious society of that name, or answering to it, should be rejected for all purposes, except as a *descriptio personarum* of the grantees: *Held, also*, that the whole scope and language of the deed excluded the idea of a deed in trust for a religious corporation:

11. *Held, further*, that assuming that the grant was made for the use and benefit of a corporation, even if such corporation had been judicially dissolved, and its franchises forfeited, the title to the property would not revert to the grantor or his heirs; the language of the statute (1 N. Y. Statutes at Large, pp. 557, 558, § 9), respecting the dissolution of corporations, precluding the idea of the land reverting, in such a case; at least not until all the debts owing by the corporation are paid. And that assuming the facts existed, which would in a direct proceeding against the corporation by *scire facias* or other action, be sufficient to justify a judgment of dissolution and ouster, the heir at law of the grantor could not avail himself of such facts collaterally; the corporation never having been judicially dissolved, but being still in existence, retaining its corporate functions and franchises (*Towar* agt. *Hale*, 46 Barb. 361).

12. In an action of ejectment, the real question in dispute, to be tried between the parties was, whether R., the plaintiff's father, had not himself conveyed the land in question to the defendant. And this depended altogether upon the true starting point mentioned in the deed. The description commenced thus: Beginning at the north-east corner of lands owned by the party of the first part, and by the line fence, and running thence south," &c. In point of fact, the two objects named to indicate the one point were not together, but on the contrary were several chains apart, and R. at the time of executing and delivering the deed to the defendant, had never occupied, or claimed to own the land beyond the line fence, and did not know or claim, that the deed under which he held carried his premises beyond the line fence mentioned: *Held*, that upon this state of facts, the fence, being a visible, tangible object, must be held to be the true starting point. The general rule is, that courses and distances must yield to natural or artificial monuments or objects. This is upon the legal presumption that all grants and conveyances are made with reference to an actual view

of the premises by the parties thereto (*Raynor* agt. *Timerson*, 46 Barb. 518).

13. In determining whether a condition in a deed is precedent or subsequent, the main test is whether the vesting of the estate granted by the instrument containing it is postponed until the happening of the contingent event forming the condition, or is to be divested by it (*Twile* agt. *Palmer*, 1 Abb. N. S. 81).

DELAY.

1. A party should never be defeated of his remedy by the delay which the adverse party has occasioned (*The People* agt. *The Contracting Board*, 46 Barb. 254).

DEMAND.

1. A chattel mortgage which does not specify a time for payment, is due immediately, and no demand for payment is necessary to sustain an action upon it (*Dikeman* agt. *Puckhafer*, 1 Abb. N. S. 82).

DISCHARGE.

1. An insolvent's discharge, granted under the laws of this state, is a good defense in an action on a judgment recovered here, in the absence of any evidence as to where the contract was made on which the judgment was recovered. Evidence that the creditor was a non-resident, is not material (*Soule* agt. *Chase*, 1 Abb. N. S. 48).
2. After a defendant arrested in a civil action, has been discharged from imprisonment under the statutes relative to insolvents, the plaintiffs cannot, by merely changing the form of action to a suit for tort, instead of a suit on contract, procure the arrest of the defendant in another court, for the same cause, for the purpose of evading the force and effect of his discharge, and thereby defeating the clear intentment of the statute. (*People* agt. *Kelly*, 1 Abb. N. S. 432; to the same effect, *Wright* agt. *Ritterman*, Id. 428.)

DISCOVERY.

1. The provision of section 388 of the Code of Procedure—that the court before which an action is pending, or a judge or justice thereof, may, in their discretion, and upon due notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy

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of any books, papers and documents, in his possession or under his control, containing evidence relating to the merits of the action or the defense therein, does not sanction an order requiring either party to disclose evidence which he intends to introduce against his adversary. In the affidavit or petition for a discovery of books and papers, a statement of the advice of counsel and belief of deponent, is not alone sufficient (*Strong* agt. *Strong*, 1 Abb. N. S. 233).

DISMISSAL OF COMPLAINT.

1. If it appears on the whole case at the close of the proof in an action for slander, in charging perjury in a former action, that the testimony charged to have been perjury was wholly immaterial, or that the part of it to which the charge of perjury related, if it related to part only, was immaterial, the defendant is entitled to a dismissal of the complaint (*Wibur* agt. *Ostrom*, 1 Abb. N. S. 275).

DISTRICT COURTS, N. Y.

1. Where a defendant is arrested for fraudulent representations in contracting the debt upon which the action is brought in the N. Y. district court, on being brought before the justice upon the warrant, he may read counter affidavits to those of the plaintiff, and move thereon to discharge the arrest. But this must be done before issue joined (*Johnson* agt. *Florence*, ante, 230).
2. In an action for injuries arising from the defendant's negligence in not repairing a pier in his possession, though some evidence be given to show that he has parted with the title to the pier, the question of title is not to be regarded as raised, so as to have the effect of ousting the district or justice's court of its jurisdiction (*Canavan* agt. *Conklin*, 1 Abb. N. S. 271).

EASEMENT.

1. Where, by the report of the commissioner appointed by the court to make partition of land between heirs, the right of way is reserved across certain parts of the partitioned premises, for the purpose of enabling certain heirs to have access to wood land set to them, the party whose premises is burdened with this right of way, is bound to make its use as convenient as the mode of access which the farmer usually provides for himself to

get to and from his wood land. In the absence of any specific agreement between the parties, one whose premises is burdened by such an easement, is bound to afford reasonable facilities for its enjoyment by the other party (*Bakeman* agt. *Talbot*, 31 N. Y. R. 366).

EJECTMENT.

1. A party making title to premises by the assignment of the legal title as security for a debt, holds the same in the character of mortgagee, and as mortgagee cannot maintain ejectment for the possession of the premises (2 R. S. 312, § 57). (*Murray* agt. *Walker*, 31 N. Y. R. 399).
2. In an action of ejectment for dower, it is competent for the plaintiff to show at what time a deed from her husband, under which the defendant claims title, was delivered (*Keator* agt. *Dimmick*, 46 Barb. 158).
3. Where the plaintiff has at most, a mere equitable title to the piece of land, the possession of which he seeks to recover, no action will lie (*Peck* agt. *Newton*, 46 Barb. 173).
4. An action, in which no equitable interest in the premises is set up in the complaint, and no equitable relief is demanded—the plaintiff suing as trustee of a school district, alleging therein that the district has lawful title as the owner in fee simple—so that the possession is not sought as incidental to a specific performance, or other equitable relief, but the plaintiff counts upon his title, and demands judgment for the possession of the premises, cannot be maintained. An action to recover the possession of real estate, will not lie against a stranger in possession, in favor of a plaintiff, resting not on legal but a mere equitable title (*Id*).
5. To entitle a party to bring ejectment, no previous actual entry on the premises is necessary; a right to enter for condition broken, and to immediate possession, being all that is necessary (*Tyler* agt. *Heidorn*, 46 Barb. 439).
6. Where the plaintiff, in an action of ejectment, seeks to recover under a different title, in hostility to all rights under the grant, the defendant can set up adverse possession as a defense. But when the action is brought because of the non-payment of rent reserved in a lease in fee, then, as the defendant claims under precisely the same title, and instrument, his pos-

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session cannot be adverse; nor will the action be barred by the statute of limitations. Section 86 of the Code of Procedure, making the possession of the tenant the possession of the landlord, whenever the relation of landlord and tenant shall exist, is applicable to such a case (*Id*).

7. A false or mistaken particular in a deed may be rejected, when there are definite and certain particulars, sufficient to locate the grant. But, *prima facie*, a fixed visible monument, can never be rejected as false or mistaken, in favor of mere course and distance, as the starting point, where there is nothing else in the terms of the grant to control and override the fixed and visible call. A defendant, under a general denial, can, in an action of ejectment, show title out of the plaintiff at the time of the commencement of the action (*Raynor* agt. *Timerson*, 46 Barb. 518).

8. Showing title in the plaintiff's ancestor, during his lifetime, is enough to raise the presumption that the title continued in him until his death, and that the plaintiffs, as heirs at law, took the same by inheritance. But this is a presumption only, and by no means conclusive. It may be rebutted by proof of a conveyance by the ancestor before his death, and before the commencement of the action. Evidence showing that the land in controversy had been cleared and cultivated for over twenty years before the commencement of the action, and that during all that time it had been in the exclusive possession of the defendant and those under whom he derived title, is not admissible to establish a title by adverse possession, unless it has been pleaded for that purpose (*Id*).

ELECTION.

1. Two things must concur to qualify a person to become a voter at an election held by an incorporated religious society, after its first election: 1. Stated attendance on divine worship in the church, congregation or society, for the term of one year previous to such election; and, 2. Contribution to the support of such church, &c. Stated attendance, must be interpreted to mean the personal presence of the voter statedly at the religious meetings of the society. The regular attendance of the wife or other member of the family, is not sufficient. Persons attending the religious meetings of the society, but a few times in the course of a year, or only occasionally,

though regular contributors to its support, are not voters within the meaning of the seventh section of the act for the incorporation of religious societies. The contribution and support must be according to the usages and customs thereof; which implies that the contributions must be of a vital and substantial character. (*Per Johnson, J.*) An election is not to be set aside and declared void, merely because certain illegal votes were received, which did not change the result of the election (*People* agt. *Tut-hill*, 31 N. Y. R. 550).

ELECTION OF REMEDIES.

1. Where the gist of the transaction is a tort, if it arises out of a contract, the plaintiff may declare in tort or contract, at his election; but having made his election, he is bound by it (*People* agt. *Kelly*, 1 Abb. N. S. 452).

EQUITY.

1. Courts of equity will not entertain jurisdiction to compel the specific performance of a contract, when the plaintiff can obtain adequate redress by his action at law for damages. When the plaintiffs' rights cannot be protected or enforced at law except by numerous and expensive suits, equity may interpose to give the party redress by injunction or specific performance; but in such cases, generally, the plaintiff must first establish his right at law, before a court of equity will interfere (*Pennsylvania and Hudson Canal Co.* agt. *The Delaware Canal Co.* 31 N. Y. R. 91).
2. Where the complaint alleged, and the proof showed, that the defendants were proceeding to acquire the title to land under a destroyed instrument, or to put themselves in a situation to assail the plaintiff's title to the same premises, and secure such title to themselves through that deed; and they in fact asked affirmative relief in their answer, viz.: that the plaintiff's conveyance, under which she claimed an absolute title to the premises, might be adjudged fraudulent and void, and decreed to be cancelled and annulled; and the cause had been fully tried upon all the questions of fact involved, without objection: *Held*, that it was then too late to suggest that the case was not properly before the court for determination: *Held*, also, that in either aspect—whether the case was to be regarded as strictly in the nature of a bill in equity to remove a cloud upon the title to real estate, or gener-

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ally, in the nature of a bill *quia timet*, to settle the plaintiff's title to the property, and establish it securely against all claims which might be brought against it by reason of the destroyed deed—the case was clearly one of equitable cognizance, and the action might be maintained upon either or both grounds (*Fonda* agt. *Sage*, 46 Barb. 109).

ERROR.

1. Where there was no usurious agreement, the question whether there was a usurious intent is immaterial. A judgment will not be reversed for the admission of evidence which was needless, when it is clear that it was also harmless (*Smith* agt. *Patten*, 31 N. Y. R. 66).

ESTOPPEL.

1. Where B., as judgment creditor of a corporation of which M. was the managing member, had levied his execution upon what he alleged to be the property thereof, and B. was sued by one holding such property as purchaser at sheriff's sale under an execution against the property of a former corporation of which M. was also a managing member, claiming that said property had been fraudulently transferred by such former corporation to the latter, for the purpose of defrauding the creditors of the former; *Held*, that it was error for the court to instruct the jury that, if they believed B. had acquiesced in the use and possession of the property, as his own, by M., after the formation of the latter corporation, B. would be estopped from setting up that it was the property of the latter corporation. *It seems*, a defendant cannot entitle himself to a nonsuit, unless he first points out the defects in the plaintiff's case entitling him to such nonsuit (*Booth* agt. *Bunce*, 31 N. Y. R. 246).

EVICTION.

1. An act of the lessor, amounting to a mere trespass, and not interfering with the substantial enjoyment of the demised premises by the lessee, is not equivalent to an eviction. It is not necessary that there should be an act of expulsion by physical force, to constitute an eviction; but there must be an actual or constructive exclusion of the tenant, from the possession or beneficial use and enjoyment of the whole or some portion of the property demised (*Lounsbury* agt. *Snyder*, 31 N. Y. R. 514).

EVIDENCE.

1. In an action by *heirs at law* of an intestate son, claiming a specific performance of an oral agreement for the conveyance of land, against the devisees of the father, one of the defendants, a devisee, cannot be a witness on his own behalf to prove a conversation between the father and son, and in which the witness took part, respecting the agreement by the father to give the son a deed of the property, on the performance of certain conditions (*Loddell* agt. *Loddell*, ante, 1).
2. And it is not material whether the witness took part in the conversation or not. The broad objection is that he proposed by his evidence of the confessions or declarations of the deceased father of the plaintiffs (the son) to defeat their title as the heirs at law, and to establish his own title, he being a defendant. If the case does not come literally within the words of the statute (*Code*, § 399), "any transaction or communication had personally by such party with the deceased" father of the plaintiffs, it is within the intention of the statute (*Id*).
3. Where there is no evidence produced on the trial dispensing with the notice of demand and non-payment to the drawer of a dishonored check, and no such demand and notice having been proved, the plaintiffs are not entitled to recover upon it against the drawer (*Jaudon* agt. *Read*, ante, 190).
4. Secondary evidence is not admissible, if by reasonable diligence the original could have been produced (*Graham* agt. *Chrystal*, ante, 287).
5. The sufficiency of the proof of the loss of an instrument, is a point addressed to and determined by the court exclusively:
6. *Held*, therefore, that a referee having been satisfied that there was not sufficient proof of loss to admit secondary evidence, the court, on appeal, will not say that he erred (*Id*).
7. After a physician has proved an employment professionally, the entries in his book, of the visits, may be received to show the number of visits. Such book is evidence of nothing else; and for this purpose it is not necessary, as in other cases where books are admitted in evidence, to prove that the plaintiff keeps correct books, or that others have settled by them (*Clark* agt. *Smith*, 46 Barb. 30).

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8. In an action to recover for damage done by the defendants' cattle, horses and sheep, to the plaintiff's orchard and crops, the plaintiff, who was a witness in his own behalf, after testifying that in 1861 he had one and three quarter acres of buckwheat on his land, and that in the fall of that year the defendants' horses got in, after the buckwheat was out, and tore it to pieces, and ate what they wanted, was asked "what portion of the buckwheat the defendants' horses destroyed, in the fall of 1861?" *Held*, that the witness being a farmer, his experience as such rendered him competent to answer the question; and that an objection to the same was properly overruled. The plaintiff further testified that fifteen head of cattle went into one acre of his peas, in 1864, and destroyed two-thirds of them; that they were worth \$4 per bushel, and that he had usually raised peas. He was asked this question: "If that piece of peas had not been injured by the stock, how much would it have produced that season?" *Held*, that the witness was competent to answer the question, and that the referee properly overruled an objection to it; the evidence being necessary to enable the referee to ascertain the amount of damages the defendants' cattle did to the peas.

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competent and improper, and as calling for the opinion of the witness: *Held*, that the question was proper, and the objection to it was properly overruled. A son of the plaintiff testified that he helped harvest a crop of oats, and saw the defendants' cattle in them, about a week before they were cut: *Held*, that his testimony showed he was competent to state what proportion of the crop was destroyed by the cattle; and that an objection to a question put to him on that subject was properly overruled (*Shamans agt. Smith*, 46 Barb. 290).

9. Where the question in dispute was

whether the sum of \$35 was paid by B. for the use of land, up to April, 1863, and was received by J. for that purpose, or to apply on a contract between B. and J., the latter, after testifying positively that he told B. that he would receive the \$35 for the use of the land up to April, 1863, and that he made an entry in his cash book to that effect, was asked "What is the entry?" *Held*, that, it appearing that the witness had a distinct recollection of the facts, independent of the memorandum, evidence of the entry in the cash book was properly excluded (*Brown agt. Jones*, 48 Barb. 400).

10. In an action for an assault and battery, the plaintiff called as a witness the physician and surgeon who attended her, who was asked this question: "What was the difficulty, judging from her statement, and what you saw?" The question was objected to, on the ground that the witness could not state what was said to him. The court overruled the objection: *Held*, not erroneous. The witness then testified, in answer to the question, as follows: "She called my attention to a pain in her arm, which, at the time, from its appearance and her statement, was severe, and she believed to be violent neuralgic pains. I cannot give any information as to how it was produced. I can only say how it might have been produced," &c. The defendant's counsel objected to the evidence as to how it might have been produced. The court said the question to be put was, what the witness discovered to be the matter with the plaintiff's arm, and to what he imputed it, as a matter of medical opinion, and allowed the question to be put in that form, with the qualification, "taking into consideration what she said to you, and what you saw": *Held*, not erroneous. The following question was then put to the witness: "How could the wound with an axe produce that injury?" Which he answered. Question: "Might that end in paralysis of the arm, to a certain extent?" The court allowed the question to be put, whether, taking her statement to be true, it would produce that result: *Held*, that the objection to this evidence was not well taken. The witness was then asked this question: "Assuming that the plaintiff did receive a blow on the point of her elbow, and by the same blow the skin was discolored for some days, some three inches above, the blow being severe at the time, so as to produce a temporary suspension of the power to stand—suppose that to be so, and that from that time to this she has been

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unable to raise and control her arm, so as to do anything with it, what do you say produced that; might it have been produced by the blow?" The court overruled an objection to this question, and allowed it to be put, with the qualification, "if the jury believe the statement of facts": *Held*, that an exception to this ruling was not well taken. And it was *held*, that the questions put to the witness related to the extent of the injury the plaintiff had sustained, and the nature of that injury, and that his answers went no further. And that the answers, with the questions by which they were elicited, were all of a scientific and professional character (*Fort* agt. *Brown*, 46 Barb. 366).

11. When evidence is competent for one purpose and not for another, it should be admitted, to establish the fact which it is competent to prove, and its operation restricted to that (*Raynor* agt. *Timerson* 46 Barb. 518).

12. When it becomes material to ascertain the purpose for which a writing was executed, if not inconsistent with its terms, it may properly be proved by parol. Where the principal contract is oral, and, in part performance, a written instrument is executed, which is merely incidental and subordinate, the former is not merged in the latter (*Hutchins* agt. *Hebbard*, 34 N. Y. R. 24).

13. A guaranty of performance, indorsed upon an instrument embracing the transfer of a right of action, and an executory agreement by the assignor, in the absence of language indicating a different intent, will be construed as referring to the executory agreement, and not to the title of the assignor. Where a note is indorsed on the faith of an equitable pledge by the maker, of moneys earned by him under a contract with the state, but not yet due, a power of attorney authorizing the indorser to collect such moneys when they become payable, is not subject to revocation, being a power coupled with interest. One who afterward, while the liability of the indorser is still contingent, receives from the maker a transfer of the same fund, with notice of the equitable pledge, takes subject to the equity of the pledges. An *estoppel in pais* does not arise from the mere omission to give special notice of an equity to one already aware of its existence (*Id*).

14. On a trial of the prisoner for the crime of murder by poisoning, it is competent to prove that he had threat-

ened injury to the deceased by means of other instruments—as, by a "slung shot"—as tending to prove the *animus* of the prisoner toward the deceased. *La Beau* agt. *The People*, 34 N. Y. R. 223).

15. The extent of the cross-examination of a witness upon matters immaterial to the issue, is in the discretion of the judge before whom the trial is had (*Id*).

16. Inquiries on irrelevant topics, to discredit the witness, are within the same rule; but such inquiries should be excluded with great caution (*Per Proxham, J.* (*Id*)).

17. The declarations of a party in possession are admissible in evidence against the party making them, or his privies in blood and estate (*Gibney* agt. *Marchay*, 34 N. Y. R. 301).

18. But such declarations are not competent as evidence to attack or destroy the title which is of record, &c. (*Per Hunt, J.* (*Id*)).

EXCEPTIONS.

1. A general exception to the finding of a referee allowing interest, is not specific enough; if the error is in allowing interest for too long a time, the exception should state from what period it should be computed (*Graham* agt. *Chrystal*, 1 Abb. N. S. 121).

EXCISE.

1. The legislature of this state have the constitutional right to regulate and control the traffic in intoxicating liquors. Neither the state nor United States constitution limits the legislative discretion in regulating the traffic in articles intimately connected with public morals, safety and prosperity. A law prohibiting the indiscriminate traffic in intoxicating liquors, and placing the trade under public regulation, to prevent abuse in their sale and use, violates no constitutional restriction. Licenses to sell liquor are not contracts between the state and the licensee, giving the latter vested rights, protected on general principles, or by the constitution of the United States, etc. Such licenses are mere temporary permits to do what otherwise would be unlawful; and are not property, in any legal or constitutional sense. The act of April 14, 1866 (*Laws* 1866, chap. 578), creating the Metropolitan Board of Excise, in this state, declared to be constitutional (*Metropolitan Board of Excise* agt. *Barrie*, 34 N. Y. R. 657).

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EXECUTION.

1. Where the execution is for more than \$500, a defendant applying for a discharge under the statute, must have been three months charged in execution. It is not enough that his imprisonment under the execution and the order of arrest, has continued for three months (*Dusar* agt. *Delacroix*, 1 Abb. N. S. 409).
2. Under the provisions of 2 Revised Statutes, 556—where a defendant has been arrested in the action, the three months within which the plaintiff must charge him in execution, is from the last day of the special term for non-enumerated motions, following that at which judgment was obtained (*Haviland* agt. *Kane*, 1 Abb. N. S. 409).
3. The "team," which the exemption law exempts from sale on execution, when owned by any person being a householder, or having a family for which he provides, to the value of not exceeding \$250, includes any team which a householder or head of a family may or can use in and about the business of providing for such family. A team may be composed of one or more animals; and whatever number may compose it, if within the limit as to value fixed by statute, it will be exempt. It is sufficient for a party claiming the exemption of his horse from sale on execution, to show that the horse constitutes his team; that he is a householder; and that his household furniture, workman's tools and team, do not in the aggregate exceed in value the sum of \$250. Upon these facts being established, he is entitled to the exemption specified in the statute (*Wilcox* agt. *Hanley*, 31 N. Y. R. 548).
4. To meet the objection urged, that a team must necessarily consist of two horses, it is proper to ask the owner of the property claimed as exempt, whether one horse can be used alone. The exemption provided by the statute, is not exclusively for the benefit of the owner of the property. It is intended mainly for the benefit of the family for which he provides. Whether the debtor has more or less property, beyond the amount limited by the statute, is wholly immaterial in determining whether a team is necessary to him. Hence, evidence to show that the party claiming his horse to be exempt, as being his "team," had, shortly before the same was levied on, owned two other horses worth \$200, and had other property, which he had disposed of, and transferred the avails

to his wife, which she held at the time of the levy, is improper, and should be excluded (*Id*).

EXECUTORS AND ADMINISTRATORS.

1. One of two executors may maintain an action in equity, to call his co-executor to an account (*Wood* agt. *Brown*, 34 N. Y. R. 337).
2. Although the complaint is inartificially framed to compel an accounting, if the facts stated plainly show that it is a case where the defendant should render an account, the court may compel an accounting, under the prayer for general relief (*Id*).
3. The creditors, legatees and next of kin, are not necessary parties, except in case of a final accounting (*Id*).
4. Where the trusts under a will vested in the executor, are distinguishable from those attached to his office, the court may dismiss him as to the former, and not as to the latter. But if one of several executors is guilty of misconduct in his dealings with the estate, the court will interfere, in a proper case, to regulate his conduct, and compel him to place the notes, bonds and other securities in his possession belonging to the estate, in such custody as to enable his co-executors to obtain access to the same; and may direct the mode in which he shall co-operate with his co-executors in discharging his duties as executor under the will (*Id*).
5. It seems, the surrogate is authorized, under the statutes of this state, upon an accounting by the executor, to administer the same remedy (*Id*).

EXTRADITION.

1. In order to give the governor of a state jurisdiction to issue his warrant for the rendition, under the constitution of the United States, of a fugitive from justice of another state, the fugitive must be demanded by the executive of the latter state, a copy of the indictment, or affidavit before a magistrate, charging the offence, must be produced, and such copy must be certified as authentic by the executive (*Solomon's Case*, 1 Abb. N. S. 347).
2. An affidavit sworn before a justice of the peace, and a certificate by the executive, that he is such officer, and that his attestation is in due form, is not sufficient in this respect (*Id*).

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FACTORS.

1. Factors or commission merchants, doing business in the ordinary way, that is, receiving property from the consignors from time to time, and making sales and collections in their own names, placing the proceeds to their own credit in their bank account, charging their commissions and payments made on account of the property—making remittances to, and accepting and paying drafts of the consignors, are not liable to arrest in an action for moneys neglected to be paid over to the consignors, on sales of their property (*Duguid* agt. *Edwards*, ante, 254).
2. Such factors and commission merchants do not act in a "fiduciary capacity," within the meaning of the Code (§ 179, sub. 2), but sustain the relation of debtor and creditor to their consignors (*Id*).

FENCES.

1. Unless the encroachment upon a highway, by fences, is such as to constitute a private nuisance, as well as a public nuisance, an individual, even though he is a commissioner of highways, is not justifiable in removing the fence (*Griffith* agt. *McCullum*, 46 Barb. 561).
2. The remedy is given by the provisions of our highway statutes relating to encroachments; and to that remedy the commissioners should resort, instead of causing the fence to be removed (*Id*).

FIXTURES.

1. Nothing of a personal nature in itself will pass by a deed, unless it be brought within the denomination of a fixture, by being in some way permanently, at least habitually, attached to the land, or some building upon it. It need not be constantly fastened. It need not be so fixed that detaching it will disturb the earth, or rend any part of the building. This doctrine has been sanctioned and sustained by repeated adjudications, holding that machinery in cotton and other mills, not attached to the building, and capable of removal without injury to it, are not fixtures, but personal property (*Per MILLER, J. Voorhies* agt. *McGinnis*, 46 Barb. 242).
2. Within the principle decided in those cases, planing machines and saw benches, saws, shingle machines, cop-

per pipes for steaming hubs, lathes, and the appendages and attachments to the same, placed on the floor of a steam mill, and affixed to the building for convenience, the saw benches and shingle machine being secured by cleats to keep them in position; and which can be removed without any difficulty, and without occasioning any injury or damage to the building, and be placed elsewhere, with an entire adaptation to other localities; have no particular connection with the inheritance, and are not fixtures, but personal property. They will, accordingly, pass under a chattel mortgage thereof, and will not be covered by a mortgage of the real estate, and the mills in which the property is placed (*Id*).

3. A steam engine and boilers were erected in a building put up for the purpose of containing and using the same, or other like machinery, as an auxiliary to water, and were placed upon solid brick foundations resting upon the ground, excavated for that purpose. The foundations were laid in mortar, built in a permanent and substantial manner, and the engine and boilers were bolted into such foundations. A stack of brick chimney, one hundred feet high, was also built for the use of such boilers, and was used for the boiler fires. Said boilers were of several tons weight, and the engine, with its iron bed plate, was also of several tons weight. The brick work of the foundation for the boilers was carried up and laid over the body of the boilers. The engine and boilers were, notwithstanding, capable of being removed without injury to the walls of the building, and without injury to the foundations on which they were laid, except that the removal of the boilers necessarily involved the displacement of the bricks covering the top of them: *Held*, that the removal of the boilers and engine did not require any such damage to the realty, or destruction of them, as to cancel, annul and destroy an agreement of the owner, by which they were to remain personal property, and were liable to be taken away and disposed of as such, by a chattel mortgage, in the event of the owner's failure to comply with the terms of the chattel mortgage: *Held*, also, that the fact that the building was erected for the express purpose of enlarging the business of the owner of the realty, and the machinery adapted to it, could not be considered as making any material difference, so long as the property could be removed without injury to the freehold (*Id*).

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FORECLOSURE OF MORTGAGE.

1. Where there has been a sale of mortgaged premises, pursuant to a power under statute (3 R. S. 547, § 8), the equity of redemption of the mortgagor is thereby foreclosed; though the affidavit of the publication of notice of sale, and of the posting thereof, be not made and recorded as required by statute, for twenty years thereafter. The right of the mortgagor to redeem is terminated whenever there has been a sale of the mortgaged premises regularly made, pursuant to the power contained in the mortgage, or under a decree of sale (*Tuthill agt. Tracy*, 31 N. Y. R. 157).
2. Where a senior mortgage has been foreclosed, without making a junior mortgagee party to such foreclosure suit, the junior mortgagee may redeem by paying the mortgage debt, principal and interest, without paying the cost of the previous foreclosure. The plaintiff is not affected by the foreclosure suit to which he was not a party; and stands in relation to it, as though there had been no such suit (*Gage agt. Brewster*, 31 N. Y. R. 218).

FOREIGN CORPORATIONS.

1. The members of a foreign corporation are not personally liable, in another jurisdiction, either for its debts or its torts, unless such liability is imposed by the terms of its charter, or in virtue of some positive law. The rules of state and national comity are subject to local modification by the law-making power; but rights and immunities granted by another government, so far as they are consistent with our domestic policy, and unabridged by our own legislation, are entitled to recognition and protection in our state tribunals. As there are certain conservative powers not derived from grant, but inherent in every government, because essential to its existence, so there are certain obligations springing from the necessities of national intercourse, and recognized by all civilized communities in the law of general comity (*Merrick agt. Van Santvoord*, 34 N. Y. R. 208).
2. The recognition of the rights hitherto conceded in our courts to foreign corporations is neither repugnant to our policy, nor opposed to the spirit of our legislation; and no reason exists for withdrawing from them the benefits of the law of comity, which, in other sovereignties are accorded to our own corporations. The domicil

of a corporation is in the legal jurisdiction of its origin, and it is in its nature incapable of migration; but its charter may confer powers without territorial limitation, and these may be exercised elsewhere, if they are in conflict with no restrictions of local law. (*Id.*).

3. When there are no restraints in the corporate charter, in respect to the residence of its officers, or the place where the business should be conducted, no such restrictions can be imposed by the tribunals of another state, without the sanction of the law-making power. A corporate franchise granted by one state cannot be revoked or annulled by the courts of another; and especially not in a proceeding to which the corporation is not a party (*Id.*).

FORMER ADJUDICATION.

1. Relief on habeas corpus is not to be refused in a proper case upon the ground that upon a prior writ, issued by another judge, relief has been refused, if it appears upon the second application that essentially different facts are involved from those which were presented on the first application (*People agt. Kelly*, 1 Abb. Pr. N. S. 432).
2. A judgment in favor of the defendants, in an action to recover the price of goods sold, which proceeded upon the ground that they were sold on a credit which had not expired when the action was brought, is not a bar to a second action, brought after the credit has expired. Where such a judgment does not affirmatively disclose the ground upon which it proceeded, but there was uncontradicted proof of such unexpired credit, and the existence of such credit was the only question argued on submitting the case, it will be inferred that the judgment proceeded solely on that ground, although evidence in support of another defense was given on the trial (*Wilcox agt. Lee*, 1 Abb. Pr. N. S. 250).

FRAUDULENT REPRESENTATIONS.

1. Where the common council of the city of New York authorizes the comptroller of the city to settle a claim in suit arising on contract, and the comptroller through the corporation counsel, settles the suit accordingly, and the referee to whom the action was referred, makes his report in accordance with such settlement, upon which judgment is entered in favor of the

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plaintiff against the corporation; there being no irregularity, fraud, collusion or mistake of any facts shown, the corporation cannot set aside the judgment and open the cause for trial at the circuit, merely because a new corporation counsel believes a better result could be obtained by continuing the litigation to the end, in the courts (*Law* agt. *The Mayor, &c., of New York*, ante, 385).

2. The fact that the plaintiff is an infant and purchased partly on credit from a firm apparently in straitened circumstances, does not render the sale void in law as against the creditors of the firm. Under such circumstances, the question of fraud is one of fact, and must go to the jury (*Matthews* agt. *Rice*, 81 N. Y. R. 457).

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and execution: *Held*, that this evidence was properly excluded, as being immaterial, and constituting no valid defense to the action; the defendant having no standing in court which would enable it to litigate the question of fraud in the sale from S. & W. to the plaintiff. (E. DARWIN SMITH, J. dissented. (*Campbell* agt. *The Erie Railway Company*, 45 Barb. 540.)

4. Where a vendor, who has been defrauded in the sale of his goods, proceeds to judgment against the vendee upon the contract of sale, after being fully apprised of the fraud, his election is determined, and he cannot afterwards follow the goods, or the proceeds thereof, in the hands of third persons, on the ground of fraud. Where a principal, with full knowledge of a fraud, perpetrated by his agent in the disposition of property purchased with his money, elects to prosecute to judgment for the money so misappro-

priated, he affirms the acts of his agent, and cannot afterwards pursue the property which he had elected to treat as that of his agent (*Bank of Batoll* agt. *Beale*, 34 N. Y. R. 473).

5. Where a debtor transferred, for a nominal consideration, his real estate to his wife and children, yet continued in possession of the same without any apparent change of ownership, and continued in business, paying past indebtedness by obtaining new credit and contracting new debts, until he fails in business, such transfer will be deemed fraudulent and void as to subsequent creditors. In such case the fraud consists in a design to obtain credit by means of continued possession and apparent ownership, after attempting to place the legal title of his property beyond the reach of his creditors. The fact that he paid up all indebtedness existing at the time of the transfer, by means of credits obtained afterwards, is only a transfer, and not a payment of the then existing indebtedness (*Savage* agt. *Murphy*, 34 N. Y. R. 508).

GRANT.

1. The right which an heir apparent possesses in the estate of his father, during the lifetime of the latter, is a bare possibility coupled with no interest, and is therefore not the subject of a grant (*Stover* agt. *Eylesheimer*, 45 Barb. 84).
2. Although no present or immediate estate or interest will vest in the grantee by virtue of an instrument purporting to convey the grantor's interest in his father's estate, executed during the father's lifetime, yet if made bona fide and for a valuable consideration, such an instrument may be regarded as a contract, which a court of equity will protect and enforce after the father's death, as against the claims of the grantor's creditors (*Id.*).

GROWING CROPS.

1. On land of deceased, at time of his death, go, primarily, to the executor, to pay debts and legacies, &c.; but if not needed for such purpose, they go to the beneficiary under the will (*Bradner* agt. *Faulkner*, 34 N. Y. R. 347).

GUARANTY.

1. A maker of a promissory note, procuring a guaranty by false representations, the guarantor is liable upon his

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guaranty to the payee thereof who took it in good faith and for value (*McWilliams agt. Mason*, 81 N. Y. R. 294).

GUARDIAN.

1. A settlement made by the guardian of infants, which is clearly just and advantageous to the infants, is binding upon them, and a court of equity will enforce it, if clearly made for their benefit (*Matter of Livingston, Court of Appeals, ante*, 20).

HABEAS CORPUS.

1. Where the return to a *habeas corpus* shows a detainer under legal process, the only proper points for examination are the existence, validity and present legal force of the process; except where, in commitments for criminal matters, the court or officer hearing the *habeas corpus*, is invested with revisory or corrective jurisdiction over the court or officer commanding the imprisonment, and with a jurisdiction also over the offense or subject matter of the commitment, in which case the facts constituting the grounds of the commitment may be reviewed. The *habeas corpus* cannot have the force and operation of a writ of error, or a *certiorari*; nor is it designed as a substitute for either. It does not, like them, deal with errors or irregularities, which render a proceeding voidable only; but with those radical defects, which render it absolutely void. Illegality, signifies that which is contrary to the principles of law, and denotes "a complete defect in the proceedings." Hence, where a defendant has been arrested a second time, after a discharge and exoneration for imprisonment from the same cause in another action, he may be discharged on *habeas corpus*, notwithstanding relief might be had, on motion, in the court from which the process was issued (*People agt. Kelly*, 1 Abb. N. S. 432).
2. Where the return to a writ of *habeas corpus* shows a regular execution issued upon the judgment of a competent tribunal, and such return is not traversed or denied in the manner required by law (3 R. S. 5th ed. 889, § 64), evidence to contradict the return is, nevertheless, admissible if no objection is made at the time, that no traverse has been interposed (*The People ex rel. Waldron agt. Carpenter*, 46 Barb. 619).
3. And if such evidence is offered, and considered by the judge, and his de-

cision has been rendered thereon without objection, it will be too late for the defendant to raise the objection on a *certiorari* to review the proceedings before the judge (*Id.*).

HIGHWAYS.

1. The 8th section of the act of 1847 (*Laws of 1847, p. 584*), which provides for the appointment of referees to hear and determine appeals from orders of commissioners of highways, laying out, altering, &c., or refusing to lay out or alter any road, and declares that the referee "shall possess all the powers, and discharge all the duties heretofore possessed and discharged by the three judges," virtually revived § 91 of the Revised Statutes (1 R. S. 519), which had been repealed by chapter 180 of the laws of 1845; and places the referees in the same position as the judges were in, under that provision (*Terpening agt. Smith*, 46 Barb. 207).
2. Consequently, upon an appeal from an order of commissioners of highways, refusing to lay out a highway, the referees appointed by the county judge to hear and determine the same, must give three days notice, in writing, to the occupant of land through which the road is contemplated, of the time and place at which they will meet to determine the appeal. Unless such notice is given, an order made by the referees, reversing the decision of the commissioners will be void, and will furnish no justification for an entry upon the land, by a person claiming that the same is a public highway, duly laid out by the referees (*Id.*).
3. Where R., the owner of land adjoining a highway, had acquiesced in the use of the highway as such, by the people, about fifteen years, when he sold the land to the defendant, who purchased, with knowledge of all the facts, and as overseer of highways, had not only worked the road as a public highway, but consented to the expenditure of \$200 by the town upon it, before he purchased the land: *Held*, that he had no right afterwards, to obstruct the highway, and prevent public travel upon it, on the ground that the damages occasioned by the laying out and opening of the same had not been legally assessed:
4. *Held, also*, that these circumstances amounted to a waiver by the owners of the land, of the right to have their damages assessed before the highway should be opened, or worked or used (*Chapman agt. Gales*, 46 Barb. 813).

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5. And that the prohibition revived by the act of December 14, 1847 (*Laws of 1847, vol. 2, p. 588, § 22*), against the opening, working or using of a highway, before the damages sustained by the owners of the land through which it is laid out, are assessed, did not justify the defendant in obstructing the highway; and that he was *estopped* by the facts and circumstances, from shutting it up; the highway having been opened, and worked and used, when there was no such prohibition (*Id.*).
6. If the owner of land taken for a highway has a right to damages, it is the duty of the commissioners of highways to apply to the county court for the appointment of commissioners to assess such damages. And if they refuse to discharge that duty, they may be compelled to perform it by *mandamus*. The owner of land cannot obstruct the highway, and prevent the public from traveling it, until his damages are assessed (*Id.*).
7. In an action by commissioners of highways to recover penalties for obstructing a highway, it is unnecessary for the plaintiffs to show that all the preliminary steps to the laying out of the road were taken. They are not bound to produce any record of the highway, but are entitled to recover upon proof that the highway had been worked and used by the people as a public highway, and regarded as such for fifteen years before the defendant obstructed it (*Id.*).
8. It is the duty of referees appointed by a county judge, upon an appeal from the determination of a commissioner of highways in laying out a highway, to be sworn, before proceeding to hear the appeal: and the parties have a right to presume that they have performed that duty, and cannot be charged with notice of their neglect (*The People ex rel. The Commissioner of Highways of the Town of Cohocton* agt. *Connor*, 46 Barb. 888).
9. The statute having declared, in effect, that until the referees are sworn, they are incompetent to do any other act as referees; taking the requisite oath is an act necessary to give them jurisdiction to proceed in the discharge of their duties; and the omission to do so will render all their acts *coram non judice*, and void (*Id.*).
10. The parties to the proceedings have no right to waive such an irregularity as the omission of the referees to be sworn (*Id.*).
11. There is, or may be, a wide difference between an encroachment upon a highway by fences, and a public nuisance. Every encroachment is not a nuisance. A nuisance must be something that *annoys* the public (*Griffith* agt. *McCullum*, 46 Barb. 561).
12. If the encroachment by fences, upon the highway, is of such a nature that no one in using the highway is incommoded, then it is not a nuisance (*Id.*).
13. The Revised Statutes establish no rule or law for the discontinuance, by non-user of a highway once established. The only means by which such discontinuance could be effected were by non-user for a period of twenty years, or by such an entire and absolute abandonment, as could leave, under the circumstances, no question of intent (*Amsbey* agt. *Hinds*, 46 Barb. 622).
14. An abandonment can only be predicated upon the acts of those entitled to the easement (*Id.*).
15. In respect to a public highway, the public alone, can work an abandonment by acts of obstruction. One individual cannot do it; least of all the person from whom the easement is due (*Id.*).
16. The second section of the act of 1861, to amend the Revised Statutes in respect to highways (*Laws of 1861, p. 709*), by its terms, limits the provisions of the act to "every public highway and private road, laid out and dedicated to the use of the public within the last six years," &c (*Id.*).
17. This limitation applies to the whole act. It does not, however, change the law as contained in the Revised Statutes (2 R. S. 405, § 133), except in two points, viz: first, in making it necessary to open and work a private way, as well as a public highway, within six years after it has been laid out, or it shall cease to be a road for any purpose; and secondly, in providing that "all highways that have ceased to be traveled or used as highways for six years, shall cease to be a highway for any purpose" (*Id.*).
18. The limitation of the second section prevents the application of that law to a case where a road had been a public highway by user, up to 1844, when it was shut up for a period of over six years, when it was again opened, and had since been used by the public, down to the time of the trial in 1865 (*Id.*).
19. Accordingly: *held*, that an action of trespass would not lie against an in-

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dividual for breaking down and removing a fence across such a road or way, passing through the plaintiff's farm, and traveling thereon; where it was not claimed that there had been a non-user for twenty years. (BALOOM, *J. dissented.*) (*Id.*)

HUSBAND AND WIFE.

1. There is nothing growing out of the relation of husband and wife, which prohibits the wife from acting as the agent of her husband; and if her acts be approved by the husband, such approval is equivalent to an original authority (*Berwick* agt. *Dusenberry*, ante, 848).
2. When the act done for another is apparently for his benefit, slight evidence should serve to establish a ratification (*Id.*).
3. Where, during the husband's absence, his wife without his authority, hired a house for one year, the rent payable monthly in advance, and entered into possession thereof on the 1st of May, and on the 6th of May the husband returned, and resided in the house with his wife until the 24th of May, when he paid the rent for the month of May, and moved out:
4. *Held*, that the husband, the defendant, was liable for the rent of the premises for the whole term. If the defendant intended to object to the hiring by his wife, on the ground that she had no authority, he should have acted promptly; his delay was a ratification of her conduct (*Id.*).
5. Under the statutes of this state, providing that when a man having a family, shall die, leaving a widow, or a minor child or children, certain property shall not be deemed assets, but shall be included and stated in the inventory, without being appraised, and that if there be a widow and no minor child, it shall belong to the widow. (2 R. S. 83, §§ 9, 10; *Laws of 1842*, ch. 157, § 2.) The title of the widow to such exempted property, where there is no minor child, is absolute, on the death of her husband, not only as against creditors and next of kin, but as against legatees, subject only to the right of the executor or administrator to take possession of the property for the purpose of including and stating it in the inventory (*Vedder* agt. *Saxton*, 46 Barb. 188).
6. The effect of these statutes is to give to the wives of persons owning personal property of the character specified therein, a contingent interest in so much thereof as the statutes specify, dependent only on their surviving their husbands, and the property remaining undisposed of by the husbands while living (*Id.*).
7. A husband can no more divest his wife of this contingent interest, by will, than he can divest her of dower in his real estate (*Id.*).
8. And inasmuch as the articles exempted by statute, for the benefit of the widow, are not the subject of dower, or bequest by the husband, the court will not deem him to have included them by intent, in a clause of his will giving to his wife the use and profits of "all" his "estate, both real and personal, for her support through her life." But he will be considered as having meant merely all that he had the power to dispose of; and the exempt property as not being included (*Id.*).
9. Accordingly, if the wife in such a case, transfers to another "all the personal estate given, devised or bequeathed to her," in the will of her deceased husband, the transfer cannot be applied to the exempt articles, because they are not to be deemed given, devised or bequeathed, in the will, but as passing to the widow by force of the statute (*Id.*).
10. Where the transfer contained this clause: "It is understood that this grant is intended to convey all the estate and interest in said farm, belonging to the said parties of the first part, or to either of them, whether derived from said will or otherwise:" *Held*, that this must have been intended to operate on the widow's right of dower, and showed that the parties, in the prior descriptions of the property conveyed, had in mind such as passed by the will, and not distinctively of the farm and personal property of the testator (*Id.*).
11. And that this addition of an interest in the real estate, not derived from the will, showed an intent not to include in the transfer any interest in the personal property not derived from the will (*Id.*).
12. A widow does not, by accepting a provision in her husband's will in her favor, renounce the statutory allowance. There is no incongruity in her holding both what the law and will respectively give her (*Id.*).

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INDEMNITY.

1. Where the covenant is one of general indemnity merely against claims and suits, want of notice of an existing suit against the principal does not go to the cause of action, but the judgment is *prima facie* evidence only against the indemnitor; and, in a suit upon his covenants, he may be let in to show that the principal had a good defense, which he neglected to make, to defeat the judgment; or that the judgment was obtained by fraud or collusion, &c. The same rules, in respect to notice, which apply to the indemnitor, apply also to his sureties (*Bridgeport Fire and Marine Insurance Co. agt. Wilson*, 34 N. Y. R. 275).

INDICTMENT.

1. In an indictment for obtaining money by false pretenses, it is sufficient to state, negate, and prove one false pretense; and the materiality and influence of such pretense is a question for the jury, unless, upon the face of the indictment, the pretense appears clearly to be immaterial. It is sufficient if, upon the face of the indictment, a false pretense is alleged which is capable of defrauding by inducing a credit, &c. (*Per Wright, J., Thomas agt. The People*, 34 N. Y. R. 351).
2. Two jointly indicted for an offense admitting of different degrees may be convicted of different degrees of the offense (*Kline agt. The People*, 31 N. Y. R. 229).
3. When the accused is indicted in the county where he is apprehended, for an unlawful marriage in another county, the indictment must show his apprehension in the county in which he is indicted; that being a fact indispensable to authorize the court of sessions of the latter county to try the accused (*Houser agt. The People*, 46 Barb. 38).
4. It is not enough that this jurisdictional fact is stated in the caption to the indictment or record of conviction, for the reason that it is not a fact of which the court of sessions can take judicial notice (*Id.*).
5. The omission of such an averment, in the indictment, is not a defect of form, but of substance. It is a material defect, and is not cured by the statute. (3 R. S. 5th ed. p. 1019.) (*Id.*)

INJUNCTION.

1. While an injunction remains, it must be obeyed, and it is no answer to a

charge of violation, that the injunction ought not to have been granted, or that it restrained acts which were proper in themselves, and which were improvidently restrained (*Peck agt. Yorks, ante*, 408).

2. Where an injunction order improperly restrains certain acts of the defendant, and during its continuance these acts are performed by the defendant in technical violation of the injunction, but subsequently the injunction is modified so as to dispense with the clause improperly restraining such acts, an attachment for such violation of the injunction, applied for and issued after the modification of the injunction cannot be sustained (*Id.*).
3. This is upon the general principle that an injunction, which is but an order of the court, can have no more force or extended operation after it is set aside or modified, than a statute repealed or modified, in regard to acts previously done (*Id.*).
4. To make a person who is not a party to the action or named in the *injunction order*, liable for *disobeying such injunction*, on the sole ground that he is an *agent or servant* of the defendant, such person should bear such a relation to the defendant as will enable the latter to control his action in regard to the subject matter of the injunction (*Battermann agt. Finn, ante*, 501).
5. *Bona fide lessees* of a water power, who are not made parties to the action, are not liable in damages for disobeying an injunction against their lessor, to restrain him, his servants and agents, from an injurious flow of water upon the plaintiff's premises, upon the ground that they act as the servants and agents of the defendant—the lessor (*Id.*).
6. It is an established rule, with very few exceptions, that a *landlord* is not answerable to third parties for injuries resulting from the wrongful or negligent acts of the *tenant* (*Id.*).
7. The remedy by injunction is extraordinary, and should only be resorted to where there is a clear right, as there is much greater reason to apprehend that irreparable injury will be produced by its too frequent use, rather than from the too frequent denial of this remedy (*Id.*).
8. Where the conditions of dissolution of a partnership were such that the retiring partner had the right to open and attend to, for his own benefit, letters thereafter addressed to the late

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- firm, upon certain subjects of business: *Heid*, that the mere fact that he opened, and answered, in his own name, and for his own benefit, two fictitious or "decoy" letters, addressed to the late firm at the instance of the plaintiff, their successor, and purporting to be upon business which the former had not the right to attend to, did not authorize the court to interfere by action and injunction (*White* agt. *Jones*, 1 Abb. N. S. 328).
9. An injunction will not lie at the suit of the owner of a wharf or bulkhead, having a mere easement in the nature of wharfage, in respect to the land under water in front thereof, to prevent the erection of a pier or wharf by an adjoining owner, under the sanction of public authority. If injured by such erection, his remedy is by an action for damages for the obstruction of his easement; or, if he can show title to the land on which the erection is made, by an action to recover possession thereof. (*Taylor* agt. *Brookman*.) (*Id.* 169.)
10. The court will not, upon a preliminary injunction, decide a question involving a forfeiture of corporate rights; nor usually grant a preliminary injunction if there is to be a trial involving such important rights, unless it appears from the papers before the court that serious injury will follow the refusal of it. (*People* agt. *Harlem Bridge Co.*) (*Id.* 169, note.)
11. In a suit brought by a trustee of a corporation, under the statute conferring equity jurisdiction over corporations and their managers, trustees and officers in certain cases (2 R. S. 462, 463, §§ 33, 35), against his co-trustees, to compel them to account for and pay to the company its money, which he alleges they have lost and wasted, and converted to their own use, an injunction will not be granted restraining the defendants from acting as trustees, and from managing, controlling or interfering with the affairs, property, assets, &c., of the corporation, from receiving any of such property, &c., and from consenting to be voted for, or to be elected, as trustees, or from acting as trustees on such re-election; where the action is not brought to procure a dissolution of the corporation or distribution of its assets, and the plaintiff does not ask for a receiver, and the complaint contemplates the continuance of the corporation and of its legitimate business and operations. (G. G. BARNARD, *J. dissented*, *Latimer* agt. *Eddy*, 46 Barb. 61).
12. Though the court may possess the power to restore and continue a preliminary injunction granted in such a case, which restrains the defendants from acting as trustees, it will not be exercised unless a receiver can be appointed; a receiver being necessary to preserve the property of the corporation and to protect the interests of the stockholders, and of the creditors of the corporation. (*Id.*).
13. A plaintiff asking for an injunction to restrain the owner of a building situated upon the bank of a river from erecting a foundation wall for the support of such building, on the ground that such building and wall will project into the channel of the river and interrupt the natural flow of the water, and thus cause a public nuisance, must affirmatively establish the fact that a nuisance will be created by the completion of the wall, with clearness and reasonable certainty, or he will not be entitled to that species of relief. It is not enough to make out a doubtful or possible case of danger; but the danger apprehended must appear to be imminent, and, in the natural course of events, clearly impending, and the mischief in its nature and character irreparable (*The City of Rochester* agt. *Erickson*, 46 Barb. 92).
14. If it appears, in such a case, with reasonable clearness and certainty, that the wall, and the building of which it is to form a part, occupies or is designed to occupy any portion of the bed of the river, and will naturally and necessarily obstruct the natural flow of water in the channel, and in this way contribute in any considerable and appreciable degree to the overflow of the river banks, at that point, in periods of high water, it is a public nuisance, and the right to an injunction, at the suit of the city corporation, clear and unquestionable. And this although the wall about to be erected is not designed to be constructed as formerly, at right angles with the stream, so as to form a direct obstruction to the flow of water on the upper side, but diagonally, so that the current coming against it would be deflected instead of obstructed; thus interrupting the flow of the water to the least extent possible without the removal of the entire building and its foundations. A river flowing through a populous city, subject to sudden and extraordinary additions to its average volume, should be allowed to pass free from obstruction; and its natural channel should be guarded, with extraordinary vigilance, against encroachments; and the law should freely lend

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all its powers to prevent or remove every real encroachment, when made or attempted (*Per JOHNSON, J., Id.*)

See TAXES AND ASSESSMENTS, 2, 3.

See RAILROADS, 28.

INSOLVENT DEBTORS.

1. What is insolvency? It is true that "insolvency" and "inability to pay," are synonymous; but solvency does not mean ability to pay at all times, under all circumstances, and everywhere, on demand; nor does it require that a person should have in his possession the amount of money necessary to pay all claims against him. Difficulty in paying particular demands is not insolvency:
2. *Held*, that the insolvency of the partnership in this case was not so clearly made out as to warrant any interference by the court (*Walkenshaw agt. Perzel, ante*, 233).

See ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

INSURANCE.

1. Where a policy of insurance upon a stock of merchandise covered the goods sold but not delivered, and its printed conditions provided that "in case of any transfer or termination of the interest of the insured in the property, by sale or otherwise, * * * the policy shall be void;" and "that in case of any sale, alienation, transfer or change of title in the property insured, * * * or of any individual interest therein, such insurance shall be void; and the entry of the foreclosure of a mortgage, or the levy of an execution, or an assignment for the benefit of creditors, shall be deemed an alienation of the property." *Held*, that the giving of a chattel mortgage upon the goods, without parting with the possession, or the right to possession, did not avoid the policy. The words "sale, alienation and transfer," should be construed to mean some act which divests the title absolutely (*Van Deusen agt. The Charter Oak Fire and Marine Insurance Company*, 1 *Abb. N. S.* 349).
2. If insurers, having insured one who has a special property in goods, for account of whom it may concern, after a loss and abandonment, intervene and recover a part of the goods, as they have a right to do, and receive the proceeds, without knowing the owner, and are subsequently sued by

the owner for money received, they are not liable for interest for the period before they had notice of his claim; and in such action the necessary expenses of the defendants, paid in recovering and selling the goods insured, are to be allowed to the defendants, to be deducted from the proceeds (*Robinson agt. Corn Exchange Insurance Company*, 1 *Abb. N. S.* 186).

3. Where insurers received and examined the proofs of loss presented by the insured, and in answer to the subsequent inquiries on his part, whether there were any further proofs that he could show, or anything further was wanted of him, answered that there was not, and afterwards offered to compromise the claim, but without making any objection to the proofs: *Held*, that they could not defeat his action on the policy, by objecting that the magistrate's certificate, which the policy required should accompany the proofs of loss, was never served on them (*Van Deusen agt. The Charter Oak Fire and Marine Insurance Co.* 1 *Abb. N. S.* 349).
4. A testator, by his will, gave an annuity of \$150 a year to S. M., for her support, and directed that she should also be furnished with comfortable house room, to keep house in, by herself. In an action to obtain a judicial construction of the will, it was referred to a master to ascertain what house or part of a house belonging to the testator's estate, was suitable and proper to be set apart for the use of S. M., during her life. Such a house being designated, S. M. took possession thereof, and continued to occupy the same. The executors were authorized, by a decree of the court, to pay the necessary taxes, insurance, &c., upon the house. They obtained a policy of insurance upon the house for \$800, in the name of L., as executor, and paid the premiums out of the funds of the estate. The dwelling house being destroyed by fire, while it was occupied by S. M., the insurers paid the insurance money to L., as executor. In an action by the residuary legatees against the executors, to recover such money: *Held*, that the estate being charged with the expense of providing a residence for S. M., was directly interested that she should continue to occupy the premises, instead of the executors being compelled to procure for her house room elsewhere, at the expense of the estate. That the estate had, therefore, an interest which was the subject of insurance, within the principle settled by the court of appeals in *Herk-*

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mer agt. *Rice* (37 N. Y. Rep. 178), and which could have been enforced against the insurers: *Held*, also, that the insurance being in the name of L., an executor, insured to the benefit of the estate which he represented, and the insurance money belonged to the estate, and could be sued for and recovered by the residuary legatee (*Colburn agt. Lansing*, 46 Barb. 37).

3. After an insurance company has, by its own voluntary act and election, put an end to a policy of insurance, and disclaimed all further liability upon the same, it cannot maintain an action against the insured, upon his premium note. Where an insurance company, being sued by the insured, to recover for a loss, defended the action upon the ground that the insured had procured other insurance upon the same property, without giving notice of the same, or having it indorsed upon the policy issued by such company, and the defense was sustained, and the defendant recovered a judgment *Held*, that such judgment was in legal effect an express adjudication between the parties that the policy of insurance sued on was void and of no force after the day on which the additional insurance was procured, and was expressly avoided by the election of the company, as from that date: *Held*, also, that the moment the policy became void, by the election of the company to avoid it, the note given by the insured, for the premium, also became void, for want of consideration, in respect to all future risks and losses of the company (*Tushman agt. Digler*, 46 Barb. 375).

4. A policy of insurance upon the life of W., issued on the 17th of September, 1864, contained a proviso or condition that the assured should not enter into any military or naval service, and a further proviso that he should not, without the consent of the insurer, visit those parts of the United States lying south of the thirty-sixth degree of north latitude, between the first days of June and November. At the time of the issuing of the policy, the insurer, in consideration of an extra premium of \$80, indorsed on the policy, a permit or consent allowing W. to go to any part of the United States south of the thirty-sixth degree of north latitude, and reside there, or return, within the term of one year, without prejudice to the policy, provided, and such permit was issued with the understanding, "that the said W. was not insured by said policy against death from any of the casualties or consequences of war or the re-

billion, or from belligerent forces, in any place where he may be." W. was killed in October, 1864, in the state of Tennessee, and south of the line of the thirty-sixth degree of north latitude, by a roving band of banditti, thieves and robbers, while he was engaged in rebuilding railroad bridges, and in the employ of the United States government, far in the rear of, and away from any hostile forces. *Held*, that W., having the right to be in the place where he was, when killed, and being engaged in no warlike enterprise, and exposed to no war peril, except such as existed through all the peaceful parts of Kentucky and Tennessee, at the time, the risk he ran was one covered by the permit. *Held*, also, that the permit was to be construed with reference to the known condition of the country at the time it was given; and that the parties must both be deemed to have known what the ordinary perils were, in the country where the insured proposed to go; and that their contract must be interpreted in the light of that assumption. Accordingly *Held*, in an action upon such policy, that the judge at the circuit properly took the case from the jury, and directed them to find a verdict for the plaintiff (*Wells agt. The Connecticut Mutual Life Ins. Co.* 46 Barb. 413).

5. The plaintiff vessel *Empire State*, 1862, the vessel of the Ohio, for O cargo of the following day the plaintiff whereby the their freight cargo "of feet to the No. 664. During the voyage the vessel stranded and sprung a leak, in consequence of which a large part of the cargo was wet, damaged and lost. The freight of the flour, as appeared by the bill of lading, was \$730, and the freight on the wheat was \$450. In an action upon the certificate of insurance, the plaintiffs recovered \$1200 and interest, which included the freight of the wheat, as well as that of the flour. *Held*, that had the objection that a recovery could not be had for the freight of the wheat, on the ground that the certificate of insurance covered only the freight money on flour, been raised by the plaintiffs and at the circuit, it should have prevailed. But the plaintiffs having averred in their complaint, that they were insured by the defendant

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in the sum of \$1200 on freight money on inboard cargo of the vessel, which averment was not denied in the answer; it was *held*, that such averment being material, stood admitted of record, and the plaintiffs must recover the amount specified in the contract, if they had established other facts put in issue, and necessary to make out their action. That if the defendants relied upon any qualifications of the contract, or on any contract different from that stated in the complaint, they should have denied the averment, or stated the qualification in their answer: *Held, further*, that the objection thus presented, was one of *variance* between the pleadings and the proof, which should have been taken at the trial, in order to give the plaintiffs an opportunity to remove it, by amendment or further proof; and that it could not be raised by way of exception to the findings of the judge, after the trial (*Allen* agt. *The Mercantile Mutual Ins. Co.* 46 Barb. 642).

8. The contract of insurance was, that the defendants would pay to the plaintiffs the freight money stipulated for, in case they were prevented from earning it through the perils of the lakes, rivers, canals, &c., and in case there was no breach, on the part of the assured, of any of the conditions forming a part of the contract. The disaster which occasioned the loss and damage, having occurred from the perils of the lake, without fault of the owners, master or crew of the vessel: *Held*, that the plaintiffs were entitled to recover the freight money in whole or in part. The policy contained a stipulation that grounding of the vessel, or more detention in any case, should not be cause for abandonment; and that in case of detention on the voyage by the closing of navigation, the risk should continue, but that an additional premium should be paid for the winter risk: *Held*, that this provision contemplated mere detention from the grounding of the vessel, the closing of navigation, or other causes; and that the plaintiffs were not precluded by it from recovering, where it appeared that the voyage was entirely broken up, and rendered impossible of completion according to the intention of the parties by stress of weather: *Held, also*, that the plaintiffs, having been prevented from earning full freight, by delivering the property specified in the bill of lading, by reason of a peril insured against, the defendants were bound to save them harmless and indemnified, and the plaintiffs were entitled to recover the

entire sum claimed, notwithstanding they had voluntarily surrendered up the cargo after the disaster, without exacting freight (*Id.*).

9. Where, by the terms of the contract of insurance upon the body, tackle, apparel, &c., of a propeller, the insurers are "not to be liable for the bursting of the boilers," the language is to be understood that they are not liable for damage resulting to the vessel, or otherwise, "on account of" the bursting of the boilers. "For," construed to mean "on account of," "by reason of," "because of," &c. That which was excepted from the risk by the insurers, by the use of such language, was any damage resulting as a consequence of the bursting of the boilers (*Strong* agt. *Sun Mutual*, 81 N. Y. R. 103).
10. Where there is any repugnancy between the printed and written conditions of a policy of insurance, the written conditions must prevail. Where, at the time of insurance, the insurers write across the policy, "privilege for \$4,500 additional insurance," such indorsement authorizes the insured to effect additional insurance upon the same property to that amount, without notifying the insurers thereof. Such indorsement is a waiver of notice of additional insurance within the amount specified, although the printed part of the policy requires notice to be given of any additional insurance. Describing the building as a five story brick building, making no mention of a cellar under it, is not a misdescription, though there be cellar under the building (*Benedict* agt. *Ocean Ins. Co.* 81 N. Y. R. 389).
11. A uniform practice by such company, for a period of several months prior to the transfer of the note in suit, of raising money upon its notes, upon the indorsement of its president, for the purpose of passing title, may be given in evidence to the jury, and will warrant the jury in finding that the indorsement of the note in suit was upon sufficient authority to make it binding in favor of plaintiffs (*Marine Bank, &c.* agt. *Clements*, 81 N. Y. R. 83).

INTEREST.

1. The common law rule, which requires a demand to be liquidated, or its amount ascertained, before interest can be allowed, has been so far modified, that if the amount is capable of being ascertained, it carries interest

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(*Graham* agt. *Chrystal*, 1 Abb. N. S. 112),

2. Where insurers, having insured one who has a special property in goods, for account of whom it may concern, after a loss and abandonment, intervene and recover a part of the goods, as they have the right to do, and receive the proceeds, without knowing the owner, the latter cannot, in an action against them for money had and received, recover interest thereon for the time elapsing before they had any notice of his claim (*Robinson* agt. *Corn Exchange Insurance Co.* 1 Abb. N. S. 186).

JOINDER OF ACTIONS.

1. In an action brought by the receiver of a judgment debtor, the subject of such action being the restitution of the property of the judgment debtor, the plaintiff may unite in his complaint all the different claims which he has against the defendant upon that subject of action, and set forth therein different transactions, out of which his right to restitution flows; although to reach that result, in some instances, it will be necessary to set aside transfers void for usury (*Palen* agt. *Bushnell*, 46 Barb. 24).

JOINT DEBTORS.

1. Where joint debtors are sued, and judgment had against all in form, without service on all, the defendants not served are not "judgment debtors," within the meaning of the provision of the Code of Procedure (§ 380), which authorizes summoning the representatives of a deceased judgment debtor to show cause why the judgment should not be enforced against his estate in their hands. The proper remedy of a judgment creditor in such a case, is to present his demand to the executors or administrators, and if they refuse to pay it, or to refer the claim, to bring his action thereon (*Foster* agt. *Wood*, 1 Abb. N. S. 150).

JUDGMENT.

1. To constitute a judgment record, it must be signed by a judge of the court. The statute (2 R. S. 788, § 4), authorizing the defendant, convicted or acquitted, &c., to cause a record to be made up, when the district attorney neglects to do so on request, has not dispensed with such necessity. The district attorney is not authorized to sign the record in lieu of a judge

of the court; and if so signed by the district attorney only, it is not a judgment record. The omission to state in the sentence in what prison the prisoner is to be confined, is not error. The law determines the prison; and the court have no authority to incarcerate the prisoner in any other (*Weed* agt. *The People*, 31 N. Y. R. 465).

2. Where it is alleged in the complaint that the action is brought to recover for taking away plaintiff's horse, detaining him for a limited time, and injuring him, a judgment following such complaint does not have the effect of changing the property in such horse. If the action had been in the nature of trespass or trover for the horse, a recovery and satisfaction in such case would have changed the property in the horse. The minutes of testimony taken by the justice on the trial before him, may be read in evidence, to determine whether the scope of the issue being tried before him was changed by the evidence, for the purpose of determining the subject matter of the litigation (*Thurst* agt. *West*, 31 N. Y. R. 210).
3. An order for the continuance of the term of the court of sessions beyond the third week, need not be incorporated in the record of judgment, on a conviction had during such continuance (*People* agt. *Ferris*, 1 Abb. N. S. 193).
4. When an answer is struck out as sham and irrelevant, the proper method of obtaining judgment is to proceed as if no answer had been put in. If the summons be for relief, the defendant is entitled to the usual notice of application for judgment, after the answer has been stricken out (*DeForest* agt. *Baker*, 1 Abb. N. S. 84).
5. A judgment entered against several joint debtors, upon service of summons upon only a part of them, is a judgment in form only, as against those not served (*Foster* agt. *Wood*, 1 Abb. N. S. 150).
6. Where executors or administrators are sued on a debt of their decedent, judgment for the plaintiff should be in terms that the plaintiff recover against them the sum mentioned in it, to be levied of the goods and chattels, &c., in their hands as executors, &c. (*Bank of Cooperstown* agt. *Corlies*, 1 Abb. N. S. 412).

See CRIMINAL LAW, 2, 3, 4.

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JURORS.

1. The act in relation to jurors, &c. (*chap. 822, 1858*), so far as it relates to the summoning of jurors in the county of Kings, is general, and requires that they shall be summoned by the commissioner of jurors to be appointed for the county. Such act virtually abrogates all authority in the sheriff to summon jurors to serve in the courts of King's county. Under such act, after exhausting the first panel, a new panel may be summoned forthwith to attend said court upon one day's notice (*2 R. S. 419, 420*). Voluntary intoxication can furnish no excuse of immunity for crime; and so long as the offender is capable of conceiving a design, he will be presumed, in the absence of contrary proof, to have intended the natural consequences of his own acts (*Kinney agt. The People, 31 N. Y. R. 830*).
2. Under the Revised Statutes, no venire is necessary in criminal cases (*People agt. Ferris, 1 Abb. N. S. 198*).

JURISDICTION.

1. Where a defendant has been served with process in a state court, and, before filing his bond and petition for the removal of the cause, his attorney obtains an *ex parte* order extending the time to answer, although such extension is obtained for the purpose of making the application of removal, and the attorney serves the order upon plaintiff's attorney, indorsing it with his name as "Defendant's Attorney": *Held*, that the defendant had submitted to the jurisdiction of the state court, and had lost the right to remove the cause, although his appearance was subsequently entered within the required time in the state court, and the bond and petition there filed for removal (*BARNARD, C. J. dissenting*). (*Ayres agt. Western R. R. Co. ante, 351*.)
2. No relief can be administered in equity, where the remedies at law are adequate for the attainment of justice (*Mul. Benefit Life Ins. Co. agt. Supervisors N. Y., Court of Appeals, ante, 359*).
3. The New York superior court has no jurisdiction of an action to set aside as fraudulent a conveyance of a farm of land in another state (*Bennett agt. Erving, ante, 384*).
4. The service of a summons upon a member of a military company, to appear before a court martial, must be made personally, or by leaving such summons at the residence of the party to be served. A service made by leaving the summons at the office or place of business of the party, does not give the court martial jurisdiction of the matter (*Matter of Lockwood, ante, 437*).
5. The supreme court, by virtue of its general inherent powers, has jurisdiction and authority, to a certain extent, not only over parties before it, but over its judgments, decrees and orders, also (*Barton agt. Butts, ante, 456*).
6. Under these general powers, it may vacate and set aside orders taken by default, or those irregularly or improvidently made; judgments taken by default or irregularly entered; and stay the further prosecution of any action after the plaintiff has accepted payment of his claim, during its pendency, or obtained satisfaction thereof by means of some other remedy (*Id.*).
7. Where a party has been arrested upon an attachment for contempt, and has given a bond with sureties for his appearance at court, to abide the order of the court, and has been adjudged to have been guilty of the misconduct alleged, and punishment by fine and imprisonment ordered, the statute does not authorize the bond to be prosecuted at the same time that a warrant of commitment is issued against the party. It is not the policy of the statute to give the aggrieved party two final and complete remedies for the same offense (*Id.*).
8. The state courts have no jurisdiction of civil causes in admiralty (*Steamer Moses Taylor agt. Hammons, ante, 460*).
9. Under the constitution of the United States, and the judiciary act of 1789, the United States courts have exclusive cognizance of civil causes of admiralty and maritime jurisdiction (*Id.*).
10. A contract made by a passenger, for a passage to California, with the owner of a line of California steamers, by which, in consideration of \$100, the owner agrees to transport the passenger from New York to San Francisco, as a steerage passenger, with reasonable dispatch, and furnish him with proper and necessary food, water and berths, or other conveniences for lodging on the voyage, is a contract of admiralty and maritime jurisdiction; and for a breach of which, the United States courts of admiralty have exclusive jurisdiction (*Id.*).
11. Since the adoption of the constitution of 1846, giving law and equity

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jurisdiction to the supreme court, suits for equitable relief may be commenced in that court, though the amount claimed be less than one hundred dollars (*Marsh agt. Benson*, 84 N. Y. R. 358).

12. The act of the commissioner of jurors, in determining upon the sufficiency of the excuse relied on by one asking to be struck off the list, is not a judicial act within the rule relating to mandamus. The statute clearly defining his duty, he has no discretion to exercise, when the truth of the facts relied on is clearly shown to him (*The People ex rel. Livingston agt. Taylor*, 1 Abb. N. S. 200).

See RELIGIOUS CORPORATIONS, 1, 2, 4, 5, 6.

JUSTICES' COURTS.

1. In an action of *tort* to recover damages brought in a justice's court, and judgment for a certain sum is rendered for the plaintiff, and the defendant appeals to the county court, specifying in his notice of appeal certain objections to the recovery of the judgment, but no offer to reduce the amount is served by the plaintiff, and on a trial in the county court the plaintiff recovers a larger amount than before the justice, but not sufficient to equal the amount of interest on the first judgment, from the time of its recovery, the plaintiff, nevertheless, recovers a more favorable judgment, and is entitled to costs (*Smith agt. May*, ante, 222).
2. Interest not being a necessary and legal incident to a claim of *tort*, the comparison of the two judgments should not be affected by it (*Id.*).
3. Where a justice of the peace of another town in the same county, next adjoining the residence of the plaintiff or defendant, has jurisdiction to try the action (2 R. S. 226, § 8, 3d clause): Held, that two towns contiguous at either of the corners thereof are adjoining towns, within the meaning of the statute (*Holmes agt. Carley*, 81 N. Y. R. 289).
4. Where the two justices of the sessions fail to attend the court of sessions, the county judge may call upon the bench two other justices; and, subsequently, the two justices of the sessions may appear and take their seats (*Cyphers agt. The People*, 81 N. Y. R. 873).
5. Under the statute *Laws*, 1847, ch. 455), giving a remedy for the under-

valuation of land by highway commissioners, it is not essential that the justice who issued the summons for the jury should certify the verdict (*People agt. Supervisors of Ulster Co* 84 N. Y. R. 268).

LACHES.

1. The criterion of what is excuse for laches in practice, which is applicable to individuals generally, is not to be strictly applied to the law officer of a municipal corporation, to the prejudice of the rights of the public whose officer he is. In a clear case of excusable negligence and palpable error, the court may grant relief on terms, even after a delay which might bar the application of an ordinary suitor (*Greer agt. Mayor, &c., of New York*, 1 Abb. N. S. 206).

LANDLORD AND TENANT.

1. To authorize a justice of the peace to issue a summons in *summary proceedings* for the dispossession of lands, the affidavit produced to him must show that the conventional relation of landlord and tenant exists, and that by an agreement between the parties (*Russell agt. Russell*, ante, 400).
2. Where the affidavit states that "this deponent demised, leased and to farm let, to be worked on shares, for the term of one year," &c., it does not show the relation of landlord and tenant existing, and is entirely insufficient to authorize a justice of the peace to issue a summons in summary proceedings. The parties are *tenants in common* (*Id.*).
3. It is an established rule, with very few exceptions, that a landlord is not answerable to third parties for injuries resulting from the wrongful or negligent acts of the tenant (*Batterman agt. Finn*, ante, 501).
4. The notice to be served by the landlord upon the tenant at will to determine his tenancy, need not specify the time within which the premises must be surrendered. If a time be specified in the notice served upon the tenant which elapses within less than one month from the time of service of the notice, it will not vitiate the notice. It is sufficient if the tenant has thirty days' notice in writing of the intention of the landlord to terminate the tenancy (*Burns agt. Bryant*, 81 N. Y. R. 453).

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LEASE.

1. Where the owner of a farm leased the same, with the dwelling house thereon, to another, reserving one chamber or bedroom in the house: *Held*, that his right to occupy the room reserved gave him no other right to the yard within the curtilage of the dwelling house than that of a passage or way to and from the chamber so reserved; and did not justify him in passing with his horse and wagon through the yard and removing a clothes line placed there by the tenant (*Fort agt. Brown*, 46 Barb. 366).
2. The words "hath granted, bargained, sold, released and confirmed," in the granting clause of some of the earlier conveyances of the Van Rensselaer title, are not alone decisive, in determining the question whether those conveyances are more properly termed leases in fee, or deeds of assignment. They must be construed in connection with the other portions of the conveyance. *It seems*, that by a conveyance in fee of manor lands, reserving rent, the relation of landlord and tenant is made to exist, as between the grantor and grantee (*Tyler agt. Heidorn*, 46 Barb. 439).
3. The parties who are entitled to the benefits, and bound to the performance, of such a contract, are not simply those who executed the original conveyance, but all who have succeeded to their position, or who hold under them, whether as heirs, devisees or assignees of the original parties. Such an agreement is intended to be *perpetual*, and to bind subsequent parties. The covenants *run with the land*, being connected with the estate, and growing out of its enjoyment. The parties succeeding to the title of the original grantor—the covenantee in regard to the rent—are entitled to enforce the covenant, without the aid of any reversion in the assignees. Such a covenant runs not only with the land (proper), but with incorporeal hereditaments. The rent reserved in a lease in fee, if not strictly an *estate in the land*, is nevertheless a *hereditament*, and is descendible and inheritable. The assignees of the grantee or covenantor in such a lease are liable on the covenant to pay rent (*Id.*).
4. Such liability does not depend on the existence of a reversion, and is within the provisions of the act of 1805 (*Laws of 1805, ch. 98*; 1 R. S. 747, §§ 23, 24, 25), and of the Code (§§ 111, 112). (*Id.*)
5. There is no reason for any distinction between the assigns of the covenantor and the assigns of the covenantee, in regard to the right or obligation of such covenants. The remedies which the grantor or lessor may pursue, in the event of the non-payment of rent, are, 1, *covenant*, to recover the rent itself, either as between the original parties, or as between the parties who have succeeded to their rights; or, 2, *ejectment*, to recover the premises for the non-payment of the rent. Ejectment is but a mode of enforcing the right of *re-entry*; and the authority to pursue it depends in part upon the provisions of the contract, and in part upon the provisions of the common and statute law. It is founded upon the provision of the contract which gives the party the right to re-enter the premises in the event of the non-payment of the rent, and usually, also, in the event of the want of a sufficient distress on the premises to satisfy the rent; and where a right of entry for non-payment of rent is not reserved, the landlord cannot maintain ejectment for non-payment of rent (*Id.*)
6. This condition is a *lawful* condition, and the breach of it gives a right to re-enter; and a reversion is not necessary to uphold it. The right to re-enter is conferred upon the assignees of the grantor, by the act of 1805; and the act is constitutional. Where ejectment was brought for the non-payment of rent, and the proceedings were according to the common law, a strict demand of the rent, made with all the niceties required by the common law, was essential. Yet this strict demand could be dispensed with, if the plaintiff could show that there was no sufficient distress on the premises (*Id.*).
7. But a demand of the rent, according to the course of the common law, is rendered unnecessary, under the provisions of the Revised Statutes (2 R. S. 505, § 1), whenever a half year's rent or more is due, and no sufficient distress can be found on the premises, and the landlord has a subsisting right by law to re-enter for the non-payment of the rent; the commencement of the suit being authorized to operate as a substitute for a demand of the rent and an actual re-entry. The provisions of this statute are applicable as well to grants or leases in fee, reserving rent, as to leases for life or years. The service of the notice under the third section of the act of 1846 (*Laws of 1846, ch. 274*), renders unnecessary the proof of the want of any sufficient distress. The rents and services reserved and stipulated by the manor leases in fee executed by

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Stephen Van Rensselaer are not inconsistent with the abolition of feudal tenures, or with the independent and allodial tenure under the state itself, which the "Act concerning tenures," passed in 1787 (1 R. L. 70, §§ 1 and 6), effected (*Id.*).

8. The obligation of the contract on the part of the lessee, contained in those leases, is not essentially a *personal servitude*, and therefore abolished by the late amendment to the federal constitution providing that neither slavery nor involuntary servitude shall exist within the United States. The amendment in question was not intended to, and does not, embrace *contract* service of any description, or such as flows from contracts made by a party, or grows out of a *contract* made by another person in regard to property, and connected with its enjoyment, which property such party derives from such other person and personally enjoys. Such service is never involuntary (*Id.*).

9. When an assignee of the lessee takes his title to the land, he takes it charged with the burden which the lessee has inseparably annexed to it. By taking the benefit of the grant, he *voluntarily* assumes the liability of the original grantee, in respect to the subject of the grant. *It seems*, there is no absolute and unqualified rule that the mere lapse of time will furnish conclusive evidence of the payment of rent; but it is a presumption of fact, to be determined by the court and jury upon a consideration of all the evidence, and all the facts and circumstances bearing upon it (*Id.*).

10. Where, in an action of ejectment, for rent reserved in a lease in fee executed in 1794, the course of proof which the plaintiff was called upon to pursue did not naturally direct the mind to the necessity of any proof of payment or non-payment of rent, except for the particular year (1862) when his demand was made, and on which the action was based; *Held* that, taking this circumstance into consideration, as well as the conceded existence of an instrument providing for the payment of a perpetual rent, obligatory upon the parties to the suit—the possession and production of the instrument by the plaintiff—the absence of any positive proof of non-payment, or of any facts or circumstances leading to a presumption of the extinguishment of the rent—and the transmission to the plaintiff of all the rights and interests which the original lessor had to the property and the rents,

subsequent to the execution of the instrument—the court ought not to indulge the presumption that the rent was extinguished, or discharged, or paid (*Id.*).

LEGAL TENDER.

1. A mortgage executed in 1851, to be paid in 1857, in gold or silver coin, lawful money of the United States, may be paid in United States legal tender notes, as such lawful money of the United States (*Rodes* agt. *Bronson*, 34 N. Y. R. 649).

LICENSE.

1. A mere license is in its very nature revocable (*Babcock* agt. *Uter*, *Court of Appeals*, ante, 439).

2. If a parol license be coupled with a grant, so as to be essential to the enjoyment of the thing granted, then the license may become irrevocable (*Id.*).

3. But if a parol license be coupled with a grant by parol of that which can only be effectually granted by deed, then the license remains a mere license, and, therefore, capable of being revoked (*Id.*).

4. A *riparian owner*, by license of owners above, on the same stream, enters upon their lands, and constructs there a dam and a canal to flow on his lands and work his mill: *Held*, that the license was revocable (*Id.*).

5. The contrary doctrine considered to be equally in conflict with the common law rule that an easement can only be created by deed; with the statute of frauds, prohibiting the conveyance of any interest in lands other than short leases, without writing; and with the statute requiring deeds for the conveyance of freehold interests (*Id.*).

6. Nor is the licensor's right of revocation impaired by the fact that the licensee, relying upon the license, had erected expensive works upon his own land, the value of which depended on the use of the canal and dam (*Id.*).

7. The principle that the owner of lands who encourages another to expend money upon them under an erroneous opinion of title, is *estopped* from afterward asserting his legal right, is inapplicable to this case. Where there is no fraud on the part of the owner of the land, and the person making the expenditure knows the state of the title, he makes it at his peril, and ac-

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quires no equitable rights against the owner thereby. *Mumford* agt. *Whitney* (15 *Wend.* 380), reaffirmed; *Rentick* agt. *Kem* (14 *S. & R.* 267), disapproved (*Id.*).

8. Where one, in pursuance of a license, enters upon another's land, and constructs a dam and canal, and keeps the same in repair, there is no adverse possession; there can be, therefore, no presumption of a grant arising from lapse of time (*Id.*).
9. A license is a merely personal right, and is not susceptible of conveyance (*Id.*).
10. A mortgage, therefore, of a mill, the water power of which depends partly upon parol license and partly upon grant, will not give the mortgagee title to the former part (*Id.*).
11. But where the mortgage conveys the premises upon which the mill stands, describing them by metes and bounds, but contains no reference to the mill, nor the word "appurtenances," or any equivalent expression, it conveys, nevertheless, such right to the water power as the mortgagor possesses, not depending upon mere license, although such right may extend beyond the premises actually described in the mortgage. The instrument must be interpreted as though executed and delivered in view of the premises, and, therefore, to convey the mill, as such, with whatever gave it its value as a mill, and which the grantor had power to convey (*Id.*).
12. Where the owner of land upon a mill stream, *ad medium filum aquae*, conveys the land by metes and bounds, "beginning at a stake on the bank of the river," running thence by courses and distances around the farm, until it comes again "to the U. river," and runs "thence down the bank of the river as it winds and turns, to the place of beginning," the title to the river and the land covered by it, remains in the grantor (*Id.*).
13. Defendants in possession of land under a contract of purchase, and a license to cut the timber, &c., are not liable for cutting the timber thereon while the license is operative, even though by non-compliance with the terms of the contract of purchase, they forfeit their right to the land and to the possession of the same. The license being established by proper evidence, everything done under it, before forfeiture, is lawfully done, for which no claim of damage could ac-

cruce to the plaintiff (*Pratt* agt. *Ogden*, 84 *N. Y. R.* 20).

LIEN.

1. Where several judgments have been filed and docketed, and the one having a prior lien has afterwards been vacated by an order of the special term, which order, on appeal to the general term, is subsequently vacated, and the original judgment affirmed, the lien which was thus suspended, is restored on the affirmation of the judgment by the general term; and where no new rights have been acquired by the other judgment creditors, by proceedings under their several judgments, all parties are restored to their original rights. Where the lien of a judgment is suspended by an order vacating the judgment, when such order ceases to have any validity by being vacated, the lien is revived, as though it had never been suspended (*King* agt. *Harris*, 84 *N. Y. R.* 330).

LOSS.

1. The law imposes the loss upon the party who, by misplaced confidence, has conferred the apparent right of property in bank stock upon a third party, and will protect a *bona fide* purchaser of the same (*Crocker* agt. *Crocker*, 81 *N. Y. R.* 507).

LOTTERIES.

1. The 11th section of the 7th article of the constitution of 1821, is in these words: "No lottery shall hereafter be authorized in this state; and the legislature shall pass laws to prevent the sale of all lottery tickets within this state, except in lotteries already provided for by law." The latter clause of the 10th section of the 1st article of the constitution of 1846, is in these words: "Nor shall any lottery hereafter be authorized, or any sale of lottery tickets allowed within this state (*Governors of the Almshouse* agt. *The American Art Union*, *Court of Appeals*, ante, 341).
2. Payment of the prizes in money, is not one of the essential ingredients of a lottery (*Id.*).
3. Whenever the scheme of distribution is such that if the payment of the prizes were in money it would be a lottery, it will be equally so, although the prizes are payable in lands or chattels (*Id.*).
4. The intention of the framers of the

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constitution undoubtedly was to forbid the future granting of any such lotteries as had at any time previously been authorized by law, and by requiring the legislature to pass laws to prevent the sale of all lottery tickets, to put an end to all such distributions of money or goods, by lot or chance, as had heretofore been forbidden by the statute, under the name of private lotteries (*Id.*).

2. The American Art Union was originally incorporated by the name of the Apollo Association, with power, among other things, of making such a constitution, by-laws and regulations, as they should judge proper for certain enumerated purposes (*Id.*).

3. The corporation made and adopted a constitution on the 22d of December, 1862, and by its provided that at of the association works of art per year should be determined, the members, each in to one chance or bution, for each subscribed and p

7. By the first section of the act of January 28, 1864, the name of the Apollo Association was changed to "The American Art Union." The second section stated that: "The distribution of the works of art belonging to the association, provided for in the constitution thereof, and the annual election of officers, shall be held on the Friday preceding the 25th day of December in each year, instead of the time stated in the fourth section of the act hereby amended."

8. *Held*, that the scheme of the association formed under their constitution and by-laws, for the sale and distribution of its works of art, was a lottery, within the meaning of the constitution, and the legislature had no power to authorize or sanction it. Consequently an action against them to recover the statute penalty, given for violating the laws against lotteries, was properly brought, after a sale and distribution of their pictures under the scheme above mentioned (*Id.*).

MANDAMUS.

1. In November, 1860, the contracting board caused notice to be published, advertising for sealed proposals for keeping in repair certain portions of the Erie canal, for three years. The notice required that "all proposals

must be accompanied by a certificate of deposit in some banking institution, &c., certifying that the sums of money above specified, have been deposited in said institution to the credit of the auditor of the canal department." The relator sent in sealed proposals for section No. 3, which were the lowest made. They were accompanied by a certificate of deposit, certifying that the relator had deposited in the M. V. Bank (the requisite sum), to the credit of himself, which certificate was indorsed by said relator as follows: "Pay N. B. B., auditor, &c., or order." The board rejected the relator's bid, although the lowest, and refused to award the contract to him, on the ground that a certificate of deposit to his own credit, and indorsed by him to the auditor or his order, did not comply with terms of the notice: *Held*, that the relator being the lowest bidder, and having furnished the requisite security for performance, was clearly entitled to the contract; and that the contracting board, in rejecting his bid and awarding the contract to another, acted without authority (*The People ex rel. Flickerman agt. The Contracting Board*, 46 Barb. 265).

2. The certificate of deposit conformed, in substance, if not absolutely in form, to the requirements of the notice, and gave to the contracting board the whole benefit of the deposit, equally as if it had been in every respect formal. And such being the case, there was no discretion left in the board to award the relator the contract. He was entitled to it as matter of right and of law (*Per Hoosboom, J.*). And it was *held*, that under these circumstances, the right of the relator to a mandamus was perfectly clear, unless there was something in the facts presented which showed some combination, or that the proposals made were excessive, or disadvantageous to the state. If, in such a case, it is found by the judge who tries the cause, that the relator's bid was rejected on account of the form of the certificate, the court will assume that there was no other reason for the refusal to give the contract to the relator; and hence a mandamus is the proper remedy for enforcing his rights (*Id.*).

3. That remedy will not be defeated by the objection that the state is the defendant, and that a party cannot sue the state, the state not being the defendant, in such a case, but certain ministerial officers, who are bound to perform their duties. The question whether the defendants still have it in their power to award the contract to

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the relator, does not arise, upon an appeal from an order of the special term awarding a peremptory mandamus. That question should be presented for the consideration of the court upon the original application for the writ. The remedy by mandamus in such a case, will not be defeated by the fact that the time for the performance of the contract has expired, if it had not expired when the mandamus was ordered (*Id.*).

MARINE COURT.

1. The act of 1853 (*chap.* 617, § 5), directing the mode of appeal to the general term of the marine court, makes sections 348 and 335 of the Code of Procedure applicable to appeals in that court (*Robert agt. Donnell*, 1 *Abb. N. S.* 4).
2. On an appeal from a judgment entered by the direction of a single justice of the marine court to the justices thereof at general term, security may be given by the appellant, which will operate as a stay of proceedings according to the provisions of the Code. By the provisions of the act of 1853 (*chap.* 617, § 5), an appeal may be taken from a judgment entered by a single justice of the marine court to the justices thereof at general term, in the same manner and with the like effect as appeals in the supreme court, &c (*Robert agt. Donnell*, 31 *N. Y. R.* 446).

MARRIED WOMEN.

1. An action for the breach of a contract of marriage, between parties in this state, cannot be maintained where one of the parties was, by law, incapable of entering into the marriage relation at the time of making the contract. Where a divorce has been granted on the ground of the adultery of the husband, he cannot, in this state, make a valid contract of marriage during the lifetime of his wife who obtained the divorce (*Haviland agt. Halstead*, 34 *N. Y. R.* 643).
2. Section 3 of the laws of 1848 and 1849, in respect to married women, vests in the wife the legal title to the rents, issues and profits of her real estate, as against the husband and his creditors, "with the like effect as if she were unmarried;" and the husband cannot now, as formerly, acquire title to such property in virtue of his marital rights. Where the wife was the owner of a farm upon which she resided with her husband, and which he carried on in

her name, without any agreement as to compensation: *Held*, that neither the products of the farm, nor property taken in exchange therefor, could be attached by creditors as the property of her husband. Where the legal title to property is in the wife, as against her husband, it cannot be seized to satisfy his debts, without proof that in the given case, her title is merely colorable, and fraudulent as against the creditors of the husband (*Gage agt. Dauchy*, 84 *N. Y. R.* 293).

MASTER AND SERVANT.

1. A parent may maintain an action against the defendant for debauching his minor daughter, and communicating to her a venereal disease, by which she was made sick and unable to labor. This action is not maintainable upon the mere relation of parent and child; but upon that of master and servant. To maintain this action, it is not sufficient to prove the seduction merely; but the plaintiff must show that a direct injury to his rights as master resulted therefrom. Wherever the wrongful act, by immediate and direct consequence, deprives the master of the services of his servant, or injuriously affects his legal rights to such service, the law gives the remedy. It is not sufficient to defeat the plaintiff's right of action, to prove that the daughter had had illicit intercourse with two other persons about the same time (*White agt. Nellis*, 31 *N. Y. R.* 405).

MECHANICS' LIEN.

1. A mechanic, who furnishes materials or labor in the construction of a building in the county of Westchester, acquires under chapter 384 of the laws of 1852, a specific statutory lien on the interest of the existing owner, which may be enforced by judgment, as in a personal action. This lien may be lost by omitting to comply with the conditions prescribed in the act. The law in question, in its application to future contracts, is free from constitutional objection. The owner of the building cannot defeat the lien, or relieve himself from contingent liability, by subsequent conveyance of the property to a party (*Blauvelt agt. Woodworth*, 31 *N. Y. R.* 285).

MERGER.

1. Merger never takes place except where the legal and equitable estate

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write in the same person, and not even then, when it is the clear intent of all parties in interest that it shall not take place (*Basson* agt. *Smith*, 24 N. Y. R. 380).

MOB.

1. The act of the legislature of April 12, 1865, to provide for compensating parties whose property may be destroyed in consequence of mobs or riots, is not in conflict with the provision of the constitution of this state, which declares that "the county shall never be made responsible for the acts of the sheriff." The statute does not profess to create a liability on account of any act of the sheriff. It is the act of a mob or riotous assembly, that creates the liability of the city or county, and not the act or default of the sheriff. The provision of the act requiring notice to be given to the mayor of the city, or sheriff of the county, after the owner of the property has been apprised that a threat or attempt has been made to destroy or is made by any mob or riot, is contemplated that a sufficient time shall intervene betwixt the threat or attempt, and the giving of it, to admit of the notice given (*Moody* agt. *The Board of Supervisors of Niagara County*, 450).

2. It was not the intention of the legislature, by the act above mentioned, to provide a redress which would be only available in those cases where the mob or riotous assembly proceeded with so much deliberation and publicity as to allow their purposes to become known to the party whose property was intended to be injured or destroyed, and to deny it where the usual secrecy should be observed, and no suspicion of any unlawful purpose or design could be apprehended, until it should be carried into execution. The liability of the city or county, as it is declared in the first section of the act, is general, applying to all cases whatsoever, where property may be destroyed by riots or mobs. And the comprehensiveness of this section is only so far restricted by that which follows it, as to deny the remedy provided for, where the party has been previously apprised of the threat or attack, and after being so apprised, has failed to give the required notice. In an action against a county to recover the value of property destroyed by a riot or mob, the plaintiff gave evidence showing that she was not apprised of any threat or attempt to in-

jure or destroy her property, before the attack was made upon it; and that at the commencement of the attack she was forcibly taken by members of the village police and others, acting in concert with the mob or riotous assembly, and detained in custody until the destruction of her property was completed: *Held*, that such taking and detention put it out of the plaintiff's power to give the notice mentioned in the statute, and sufficiently excused the omission, not only within the apparent and obvious reason of the statute, but also within the case of *Schaefer* agt. *Supervisors of Richmond County* (43 Barb. 490). (*Id.*)

3. The defendants in each action offered to prove that the houses destroyed, in addition to being bawdy-houses were the resort of thieves, robbers, murderers and other criminals; that immediately preceding their destruction, a citizen of the town, and one of the village police, was murdered by persons congregated and harbored in such houses; and that in consequence of the public excitement and exasperation occasioned thereby, the inhabitants of the village destroyed such houses, and the property contained in them. *Held*, that this evidence was properly rejected by the court; because if given, it would constitute no answer to the action. The fact that a house is kept as a place of public prostitution, is sufficient to render it a public and common nuisance. But a house cannot be lawfully destroyed by a riot or mob, merely because for the time being, it is devoted to a purpose which the law characterizes as a common public nuisance (*Id.*).

MORTGAGE.

1. A mortgage of a mill, the water power of which depends partly upon parcel license and partly upon grant, will not give the mortgagee title to the former part (*Babcock* agt. *Uter*, Court of Appeals, ante, 420).

2. But where the mortgage conveys the premises upon which the mill stands, describing them by metes and bounds, but contains no reference to the mill, nor the word "appurtenances," or any equivalent expression, it conveys, nevertheless, such right to the water power as the mortgagor possesses, not depending upon parcel license, although such right may extend beyond the premises actually described in the mortgage. The instrument must be interpreted as though executed and delivered in view of the premises, and therefore, to convey the mill, as such,

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- with whatever gave it its value as a mill, and which the grantor had power to convey (*Id.*).
3. The rights of a purchaser of premises embraced in a mortgage previously assigned by his vendor to another are to be determined by the records in the clerk's office, and the facts fairly to be inferred from what is there stated. It is immaterial whether he actually searched or examined the records. He is to be charged with all the knowledge and information which the fullest examination of them would have imparted (*Purdy* agt. *Huntington*, 46 Barb. 389).
 4. One who purchases land for a good consideration, and first puts his deed on record, has the rights of a purchaser in good faith, and will be protected, by the registry act, from the lien of a prior unrecorded assignment of a mortgage upon the property, held by another. The statute requiring assignments of real estate to be recorded (1 R. S. 756, §§ 1, 38) applies to assignments of mortgages. Subsequent grantees or mortgagees of land, for a valuable consideration, without any actual notice of an unrecorded assignment of a prior mortgage, are to be regarded as purchasers in good faith, under said act. If such mortgage does not appear by the record to have been assigned, they may assume that it is still held by the mortgagee, and may contract with him upon that assumption; and if they do so, in entire ignorance of a prior unrecorded assignment, and in perfect good faith as matter of fact, the title so acquired should prevail over the assignment (*Id.*).
 5. A deed of conveyance, absolute upon its face, if intended for the security of a debt, is in equity a mortgage. If one, holding as assignee, and for security, a certificate of sale by the state from the surveyor general, pays up the balance due the state, and takes a patent for the premises, he nevertheless holds as mortgagee in equity, although the legal title, upon the face of the patent, be absolute in him (*Murray* agt. *Walker*, 31 N. Y. R. 399).
 6. A bill of sale, absolute upon its face, transferring property to be held as security for the payment of a debt due the vendee, is, in character and effect, a mortgage, and is to be treated as such. In such case, the mortgagee acquires only a lien upon the assigned property; the residuary interest of the mortgagor therein may still be reached by his creditors. And where, in such case, the assignee is to complete the process of the manufacture of the assigned property, and prepare the same for sale, such condition is not inconsistent with his rights and duties as mortgagee, and, consequently, does not render the assignment void (*Smith* agt. *Beattie*, 31 N. Y. R. 542).
 7. A clause, authorizing the mortgagor to retain possession until the mortgagee deems himself insecure, does not render the instrument void, if executed in good faith, and valid in all other respects (*Frost* agt. *Mott*, 34 N. Y. R. 253).
- See LICENSE, 1, 2, 3, 4, 5, 6, 7, 8, 9, 12.
- ### MORTGAGE FORECLOSURE.
1. In granting an order of publication for the service of summons in an action for the foreclosure of a mortgage, the Code requires that it shall appear "by affidavit, to the satisfaction of the court or a judge" granting the order, that the person on whom the service of the summons is to be made cannot, after due diligence, be found in this state. There is no good reason why this may not be shown by an affidavit properly made and forming a part of the records of the court, although made in another action, and not in the particular action in which the order is asked (*Brainerd* agt. *Heydrick*, ante, 97).
 2. In an action for the foreclosure of a mortgage, the non-residence of the defendants is not necessary to be shown. It is sufficient to establish the fact satisfactorily that they could not, after due diligence, be found within this state, so as to enable the plaintiff to effect the service of the summons on them (*Id.*).
 3. A copy order appointing a guardian ad litem of a non-resident infant defendant, is not invalid by reason of being deposited in the post office two days before the order and the affidavits on which it was founded were filed, where it appears that the order was made on the day of the deposit. The order becomes effectual when filed, from the time it is granted. The previous deposit is, at most, an irregularity that can be remedied at any time by filing the order *nunc pro tunc* (*Id.*).
- See OFFER OF JUDGMENT, 1, 2, 3.

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MOTION.

1. A notice of motion served, cannot be withdrawn or countermanded, without payment of the costs of the motion (*Walkenshaw* agt. *Perzel*, ante, 810).
 2. But where a motion as originally noticed was, 1st. For leave to add parties defendant: 2d. For an injunction and receiver: *Held*, that these motions were distinct, and that the first part of the motion might be withdrawn, leaving the second part still pending, without payment of the costs of the motion (*Id.*).
 3. An application to the favor of the court should not be denied on the ground that the moving party is in contempt of another court (*Strong* agt. *Strong*, 1 Abb. N. S. 358).
 4. It is not generally essential that the defendant in moving to compel the plaintiff to reply to an answer of the statute of limitations, should state that he does not know the ground on which the plaintiff intends to rely to defeat the bar of the statute (*Hubbell* agt. *Fowler*, 1 Abb. N. S. 1).
 5. The objection that the assessors have assessed property for a local improvement in the city of New York more than is allowed by law, may be raised for the first time before the supreme court on a motion to vacate the assessment (*Palmer's Petition*, 1 Abb. N. S. 30).
- MUNICIPAL CORPORATIONS.
1. The comptroller of the city of Brooklyn has not exclusive power over the financial concerns of the city (*People* agt. *Booth*, ante, 17).
 2. The mayor is vested with a discretionary check with respect to payments out of the city treasury; and it is his duty to take care that no money is drawn out of the treasury unless in pursuance of law (*Id.*).
 3. A corporator of a municipal corporation, has a right to have a general inspection, and take copies of the public documents and records of the corporation, under such rules and restrictions as will preserve the safety of the records, and prevent any serious interruption of the duties of the *custos* (*People* agt. *Cornell*, ante, 149).
 4. Where the common council of the city of New York authorizes the comptroller of the city to settle a claim in suit arising on contract, and the comptroller through the corporation counsel, settles the suit accordingly; and the referee to whom the action was referred, makes his report in accordance with such settlement, upon which judgment is entered in favor of the plaintiff against the corporation; there being no irregularity, fraud, collusion or mistake of any facts shown, the corporation cannot set aside the judgment and open the cause for trial at the circuit, merely because a new corporation counsel believes a better result could be obtained by continuing the litigation to the end, in the courts (*Law* agt. *The Mayor, &c. of New York*, ante, 385).
 5. The Hudson River Railroad Company have no authority, either with or without the consent of the corporation of the city of New York, to extend their tracks from Chambers street through College Place and Warren street, to Broadway, in the city of New York (*People* agt. *Hudson River Railroad Co.* ante, 394).
 6. The granting of a license by the officers of a municipal corporation, to a plumber, to make and connect service pipes for conducting water from the distributing pipes of the city to private houses, and the giving of a special permit to him to connect with a city sewer, under the direction of the city inspectors, does not make the plumber an officer or servant of the city, when employed by, and working for private parties. And for damages occasioned by the negligence of the licensed plumber, in not guarding an excavation made by him in the street, and leaving a pile of earth thereon, while doing the work under such license and permit, the city is not responsible. A municipal corporation is not liable for the acts of its inhabitants in obstructing its streets, when notice of such obstruction is not shown to have been received by its officers, nor is presumed, from lapse of time (*Dorlon* agt. *The City of Brooklyn*, 46 Barb. 604).
 7. Under a statute (*Laws of 1865, chap. 180*), making it the duty of a municipal corporation to create a stock or fund to an amount, and upon terms of payment fixed in the statute, and requiring the comptroller of the corporation to prepare and issue the stock, and sell the same; the corporation have a duty to perform in creating the stock by ordinance, before the comptroller can issue it. A mandamus to compel the corporation to create the stock, is properly addressed to the common council, although the corporation are designated in the statute.

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ute as the mayor, aldermen and commonalty of the city (*The People ex rel. The Market Commissioners* agt. *The Common Council*, 1 Abb. N. S. 318).

8. The property owned by the city corporation is held by it as a public corporation, and is subject to the law-making power of the state vested in the corporation. *It seems*, that property held by the corporation for public use, etc., is not subject to levy and sale on execution, etc. But property not held in trust for such use, may be thus subject (*Darlington* agt. *Mayor, &c. of New York*, 31 N. Y. R. 164).

See RAILROADS, 10, 11, 12, 13, 14, 15, 16, 17, 18.

MURDER.

1. On a trial of the prisoner for the crime of murder by poisoning, it is competent to prove that he had threatened injury to the deceased by means of other instruments—as by a “slung shot”—as tending to prove the *animus* of the prisoner toward the deceased. The extent of the cross-examination of a witness, upon matters immaterial to the issue, is in the discretion of the judge before whom the trial is had. Inquiries on irrelevant topics, to discredit the witness, are within the same rule; but such inquiries should be excluded with great caution. (*Per PROCKHAM, J.*) (*Le Beau* agt. *People*, 34 N. Y. R. 223.)

NEGLIGENCE.

1. A passenger, who is injured in attempting to leave the cars on seeing two trains approaching each other at such a speed as to make a serious collision inevitable, is not to be deemed guilty of negligence (*Buel* agt. *New York Central Railroad*, 31 N. Y. R. 314).
2. Although he is upon the platform of the cars, attempting to escape, at the time he was injured, he is not standing or riding upon the platform in such a sense as to excuse the company under the regulation prohibiting passengers from standing or riding on the platform when the cars are in motion (*Id.*).
3. It is erroneous to non-suit a plaintiff who was injured by a locomotive crossing a street, without signals, in violation of law, where his omission to discover its approach was due to the neglect to give the usual warning. A foot passenger on the public high-

way, who is not aware of the vicinity of a moving train, is at liberty to assume that none is approaching, when no flag is displayed and no whistle or bell is sounded. As between him and the railroad company, he is not bound to be on the alert for danger, when he has the assurance of the company that the crossing is safe (*Beisiegel* agt. *N. Y. Central R. R. Co.* 34 N. Y. R. 622).

4. Passengers are not to be deemed guilty of negligence for standing on the platform of cars in motion, when there are no vacant seats for them within the cars. It is no part of the duty of passengers to enforce the regulations of the company, involving interference with passengers: that duty devolves on the conductor, agents, or employees of the company. It is not the duty of passengers to pass from one car to another, in search of seats, while the cars are in rapid motion. The passenger owes no duty to a railroad company to select for himself the safer seat on the train. It is the duty of the company to the passenger to make all seats safe. The plaintiff was injured by an accident to the cars while in motion, while he was standing on the platform of the car, being unable to find a seat within the cars: *Held*, that the defendants were liable (*Wilks* agt. *Long Island R. R. Co.* 34 N. Y. R. 670).
5. One who reserves a right of possession and use in a pier, though he has parted with the title, is still liable for injuries caused by its bad condition (*Cannavan* agt. *Conklin*, 1 Abb. N. S. 271).
6. The defendant having introduced gas into a house occupied by the plaintiff's father, by means of pipes leading through the cellar wall, an escape of gas occurred, of which the defendant was promptly notified. The defendant, as was its custom, sent S., one of its servants, to ascertain where the leak was, who lighted a match, and thereby ignited the escaped gas in the cellar, causing an explosion, by which the house was blown to pieces, and the plaintiff seriously injured. *Held*, that the evidence of negligence on the part of the defendant was clear and decisive; the casualty being the direct and immediate consequence of the explosion, which was caused by the negligent act of the defendant's agent; and that the defendant's negligence was established by that fact, whether S. was wholly or only in part the defendant's agent; but that the judge correctly held, on the trial, that S. was exclusively the defendant's

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agent, and that the act done was in the line of his agency, and the defendant responsible for his acts. *Held, also*, that S.'s duties extended to such an examination as was necessary to determine the *locality* of the leak, wherever it was, and the catastrophe originated in the improper method resorted to for the purpose of pursuing such examination; and that hence the judge was not bound to charge the jury that the defendant was not liable for S.'s negligence if the leak was in the brass head, and not in the service pipe (*Lannen agt. The Albany Gas Light Co.* 46 Barb. 264).

7. And it appearing that the leak was in a pipe called a bent, close to its joint with the service pipe, which was not put in by the defendant, but by the plaintiff's father, and that the pipes put in by him were in fact originally put in with care, and had been inspected and approved by the defendant; and there being no decisive evidence to show how the fracture in the pipe was produced; *it was held*, that this was a question for the jury to determine, and that the court would assume it was presented to them under proper instructions from the judge. *Held, also*, that it was a question of some difficulty whether the act of permitting the gas to escape, which in itself was not the cause of the explosion, could be said to have contributed to it in so direct or proximate a manner as to justify the imputation of such negligence as should defeat a recovery for damage consequent upon the explosion. *Held, further*, that, had the plaintiff been an adult, there would have been no ground for charging her with personal negligence; and that she was not more chargeable for being an infant of tender years. There is no just or legal principle which, when an infant is himself free from negligence, imputes to him the negligence of his parent, when if he were an adult he would escape it (*Id.*).

8. The principle of the rule established by the case is, that before a party can be made liable for negligence, he must himself, personally or by his agents, have been guilty of it; that he ought not to be chargeable for the negligence of another, over whose movements he has no control or rightful authority, and whose negligence he had no reason to anticipate; and that though this doctrine may in some cases expose a defendant to an action where, if the action were brought by another party, for damages resulting from the same casualty, he would not be liable, yet it works no injustice, as

it never allows a party to recover, unless his adversary has been guilty of negligence, and he himself is free from it (*Id.*).

See RAILROADS.

NEW YORK CITY.

1. The city judge of New York has power to allow a writ of *habeas corpus*; but if he refuses to do so, it being discretionary with him whether to allow it or not, the remedy is not by mandamus (*The People ex rel. Ryan agt. Russell*, 46 Barb. 27).
2. The proviso in the act of April 3, 1807, by which it is declared that the proprietors of lands adjacent shall have the pre-emptive right in all grants made by the corporation of the city of New York, of the lands under water in the Hudson river, granted to the city by that act, is a mere restraint on alienation, which can be waived by the original grantors, the state; and does not confer any legal right to, or interest in such lands under water, upon the proprietors of the adjacent uplands (*Toule agt. Palmer*, 1 Abb. N. S. 81).

NEW YORK HARBOR.

1. A platform or structure erected on spiles, of about forty feet in length, and twenty feet in width, in the North river, adjoining a pier, by a lessee thereof, is an obstruction to the free use and navigation of the harbor by the public, and, therefore, a public nuisance (*Moore agt. The Board of Commissioners of Pilots*, ante, 184).
2. The board of commissioners of pilots, or any other party, cannot be interfered with by injunction, in proceedings to abate such nuisance (*Id.*).

NEW TRIAL.

1. In an action against the drawer of a bank check, the defense being that it was given for the benefit of a third person, on an agreement that it was to be paid only out of funds to be provided by him, the plaintiff testified that before he took the check the defendant told him that he had security and would pay the check, and that he (plaintiff) took it for value. The defendant testified that he never had any conversation with plaintiff before the latter received the check. After verdict for the plaintiff: *Held*, that newly discovered evidence of declarations of the plaintiff that he knew be-

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fore he took the check that it was made on the condition alleged by the defendant, was a good ground for granting a new trial. The circumstance that proof of such facts would tend to discredit the plaintiff, does not convert the evidence into mere impeaching evidence. Nor is such evidence to be deemed cumulative, but is direct and independent testimony (*Oakley* agt. *Sears*, 1 Abb. N. S. 368).

2. The statute as to the mode in which jurors are to be drawn is directory; and a neglect to conform to its provisions is not, in itself, a sufficient ground for setting aside a verdict where the prisoner has not been prejudiced (*People* agt. *Ferris*, 1 Abb. N. S. 198).
3. A verdict assessed upon a plainly erroneous method of computation of the value of a life estate, may be set aside on the ground of mistake, inadvertence, or excusable neglect, even after a motion for a new trial has been denied, and judgment has been entered (*Greer* agt. *The Mayor, &c. of New York*, 1 Abb. N. S. 206).

NOTARY PUBLIC.

1. A notarial certificate of presentment, protest for non-payment, and notice thereof, is properly received as presumptive evidence of the facts stated therein, where the defendant does not by his answer deny the fact of having received notice; but on the contrary, he admits that he received notice, though not until nearly a month after the note fell due. The statute making such certificate presumptive evidence of the facts contained therein, unless the defendant shall annex to his plea an affidavit denying the receipt of notice (3 R. S. 5th ed. 283, § 85), only applies where no notice has been received at any time (*Union Bank of Rochester* agt. *Gregory*, 46 Barb. 98).

NOTICE.

1. The law requiring the board of commissioners of pilots to give notice to persons erecting structures beyond the exterior line defined by the commissioners for the preservation of New York harbor, under the laws of 1860 (ch. 522, § 2), is not complied with when the notice is made out and served by the president of the board. The law requires such notice to be given by the board itself. When given by the president, though verbally authorized by the board, it is not sufficient. Such defective notice will

not charge the person notified with the penalty imposed by law for continuing such structures after notice (*Board of Commissioners of Pilots* agt. *Vanderbilt*, 81 N. Y. R. 265).

2. The published notice of an order to creditors to show cause, stating that the proceeding is for the discharge of an insolvent from his debts, need not specify the particular statute under which it is had; and adding a defective reference to the statute does not vitiate. The proof of publication of such notice is not limited by the statute to an affidavit of the printer or the clerk or foreman of the printer, although it enables the insolvent to perpetuate the evidence by taking their affidavit (*Soule* agt. *Chase*, 1 Abb. N. S. 48).
3. Proof that a notice was "published in the New York Day Book" is sufficient to show compliance with an order that it be published in "the newspaper published in the city of New York, entitled 'The Evening Day Book,'" in the absence of any evidence of the existence of two papers with the title of Day Book (*Id.*).

NOTICE OF APPEAL.

1. In an action of tort to recover damages, brought in a justice's court, and judgment for a certain sum is rendered for the plaintiff, and the defendant appeals to the county court, specifying in his notice of appeal certain objections to the recovery of the judgment, but no offer to reduce the amount is served by the plaintiff, and on a trial in the county court the plaintiff recovers a larger amount than before the justice, but not sufficient to equal the amount of interest on the first judgment, from the time of its recovery, the plaintiff, nevertheless, recovers a more favorable judgment, and is entitled to costs (*Smith* agt. *May*, ante, 222).
2. Interest not being a necessary and legal incident to a claim of tort, the comparison of the two judgments should not be affected by it (*Id.*).
3. A defendant having served notice of appeal, the mere service of a notice of argument by the plaintiff does not preclude him from enforcing payment of the judgment; no stay of proceedings having been given or applied for (*Arnoux* agt. *Homans*, ante, 582).

NUISANCE.

1. A platform or structure erected on

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spiles, of about forty feet in length and twenty feet in width, in the North river, adjoining a pier, by a lessee thereof, is an obstruction to the free use and navigation of the harbor by the public, and, therefore, a *public nuisance* (*Moore* agt. *Board of Commissioners of Pilots*, ante, 184).

2. The board of commissioners of pilots, or any other party, cannot be interfered with by *injunction* in proceedings to abate such nuisance (*Id.*).

3. Where mill property has been used and occupied by a party, and those under whom he claims, and to the same extent, under a title and claim of right as against all the world—individuals and the public—for a period of forty years, he cannot be disturbed, or subjected to restraint in the exercise of any of the rights pertaining to such property, except upon the ground that it is a public nuisance. If it is such a nuisance, no period of use and occupancy, however extended and uninterrupted, and under whatever claim of right, will protect it from abatement by the public authorities, or the preventive remedy by injunction to restrain its perpetuation by additions and repairs (*The City of Rochester* agt. *Erickson*, 46 Barb. 92).

4. That which is exclusively a common or public nuisance cannot lawfully be abated by the private act of individuals. The remedy is, an indictment—a criminal prosecution; unless some other remedy has been provided by statute. A private nuisance may be abated by the party aggrieved. A nuisance may be a public and a private nuisance. In such a case the public may proceed, by indictment, to abate it, and punish its author; or those individuals to whom it is a private nuisance, by reason of its being specially inconvenient and annoying to them, or because they are in some particular way incommoded thereby, may of their own act abate it. In the case of a private nuisance, the aggrieved party has an election of remedies. He may remove the nuisance, or he may have his action for the private damages sustained by him; but he cannot have both remedies (*Griffith* agt. *McCullum*, 46 Barb. 561).

5. For the purpose of abating a nuisance, so much only of the thing as causes the nuisance should be removed. And in general, where it is the wrongful use of a building that constitutes a nuisance, the remedy is to stop such use; not to tear down or demolish the building itself (*Moody* agt. *The Board*

of Supervisors of Niagara County, 46 Barb. 659).

OFFICER.

1. An officer who seizes all the property of a debtor, knowing that part of it is exempt, cannot justify the seizure by the omission of the debtor to designate a particular portion of it as not subject to execution or attachment. The officer cannot claim, in behalf of one creditor, the benefit of a waiver of the exemption in favor of another. One who has an equitable interest in property which is taken from his possession by a wrong-doer, can maintain an action for the wrong, though he be not the absolute owner. The defendant cannot set up an adverse claim to the property, in behalf of a third party, who acquiesces in the title of the plaintiff and asserts no interest in the subject of the action (*Frost* agt. *Mott*, 34 N. Y. R. 253).

2. One who, by contract with the state, assumes the duties and is invested with the powers of a public officer, is liable to an individual who sustains special damage by a neglect properly to perform such duties. The manner in which such powers and duties are conferred, whether by appointment by or by contract with the canal board, does not affect the question of liability. A public officer, or a contractor engaged to perform the duties of a public officer, is liable for negligence or malfeasance to any one sustaining special damage in consequence thereof (*Robinson* agt. *Chamberlain*, 34 N. Y. R. 389).

OFFER OF JUDGMENT.

1. In an action for the foreclosure of a mortgage, where there was a part of the principal sum not yet due, the amount of which was admitted by the pleadings, and the mortgagor—one of the defendants, with his answer, served an offer to allow judgment to be entered herein against him, decreeing due on the bond and mortgage mentioned in the complaint the sum of \$105, and interest thereon from this date, and for judgment of foreclosure and sale herein with costs, which offer was not accepted by the plaintiff, and on a reference it was ascertained that at the time of the offer there was but \$68 due on the bond and mortgage:

2. Held, that the plaintiff was entitled to costs, notwithstanding the offer. (*MARVIN, J., dissenting.*) (*Bellis* agt. *Goodwill*, ante, 137).

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3. The offer was insufficient, because it did not propose that the judgment should *adjudicate the amount not due*, as agreed upon in the pleadings, or that such amount should be paid either in whole or in part out of the proceeds of the sale, and thereby save a special application to the court for that purpose (*Id.*).

ORDER OF PUBLICATION.

1. In granting an order of publication for the service of summons in an action for the foreclosure of a mortgage, the Code requires that it shall appear "by affidavit, to the satisfaction of the court or judge" granting the order, that the person on whom the service of the summons is to be made, cannot, after due diligence be found in this state. There is no good reason why this may not be shown by an affidavit properly made, and forming a part of the records of the court, although made in another action, and not in the particular action in which the order is asked (*Brainerd agt. Heydrick, ante, 97*).

2. In an action for the foreclosure of a mortgage, the non-residence of the defendants is not necessary to be shown. It is sufficient to establish the fact satisfactorily that they could not, after due diligence, be found within this state, so as to enable the plaintiff to effect the service of the summons on them (*Id.*).

3. A copy order appointing a guardian *ad litem* of a non-resident infant defendant, is not invalid by reason of being deposited in the post office two days before the order and the affidavits on which it was founded were filed, where it appears that the order was made on the day of the deposit. The order becomes effectual when filed, from the time it is granted. The previous deposit is, at most, an irregularity that can be remedied at any time by filing the order *nunc pro tunc* (*Id.*).

PARTIES.

1. It is essential, before taking away the control of the assets of a limited partnership from members of the firm, on the ground of insolvency, to ascertain whether all who have an interest in their retention of such control are before the court as parties (*Walkenshaw agt. Perzel, ante, 233*).

2. On the death of a special partner in a limited partnership, which is indebted to him for money loaned for the

partnership business, his executors represent him in his individual claim for money loaned, and also represent him as to any interest the estate may have in carrying on the partnership (*Id.*).

3. Therefore, it is for such executors to determine, with or without the sanction of the court, whether it is most for the interest of the estate they represent, to continue the partnership, or urge their claim for money lent (*Id.*).

4. And in an action by the survivors of the special partners, and all others who may come in, &c., against the general partners, to wind up the partnership on the ground of insolvency, and for a receiver, &c., the executors of the special partner should be made parties; and as they may represent conflicting interests of the testator as to carrying on the particular business, or destroying it, and enforcing the claim of the testator for advances, they should be made defendants (*Id.*).

5. An action to recover several penalties under chapter 361 of the laws of 1865, for bringing watered milk to a cheese factory, to be manufactured into cheese, may be maintained by and in the name of the treasurer of the association, against a member of the association (*Bridenbecker agt. Hoard, ante, 289*).

6. New parties cannot be added to the action without amendment of the summons; and the summons cannot be amended of course, under section 172 of the Code, but leave of the court to amend must be obtained under section 173 (*Walkenshaw agt. Perzel, ante, 310*).

7. A plaintiff can obtain leave to amend the summons under the general prayer contained in his notice of motion, to wit: "for such other order or relief as the court shall see fit to grant" (*Id.*).

8. When a party asks leave of the court to bring in new parties, he necessarily includes in that request a further request for leave to make such amendment, and take such steps as shall be requisite to bring into court such new parties (*Id.*).

9. Provision may be made in the order allowing new parties to be brought in, for the amendment of the summons and complaint, and the service of the summons upon the new parties, and the service of the amended complaint upon the parties already in, specifying in detail the proper proceedings to pursue; or it may simply al-

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low them to be brought in, and the necessary amendments to be made to the summons and complaint, leaving the plaintiff to thereafter conduct his proceedings regularly, at his own peril (*Id.*).

10. When a statute gives an action to the party aggrieved, there is an interest vested in him; it is not a personal right. Hence, under the section of the statute giving to every person who shall pay usurious interest, for a loan, a right of action within one year, for the excess of interest, the receiver of a borrower, appointed in supplemental proceedings may sue (*Palen* agt. *Johnson*, 46 *Barb.* 21).

11. Where a penalty given by statute, for the commission of a fraud, is by the terms of the statute "to be sued for in any court of competent jurisdiction, for the benefit of the person or persons, &c., upon whom such fraud shall be committed," in the absence of any specification, in terms, by whom the action is to be brought, it must be in the names of the persons for whose benefit the suit is prosecuted; i. e., in the names of the real parties in interest. Accordingly, an action for a penalty under the act of May 2, 1864, "to protect butter and cheese manufacturers" (*Laws of 1864, chap. 518*), for supplying to a cheese manufactory, skimmed milk and milk diluted with water, to be manufactured into cheese, is properly brought in the names of the owner of the factory and the persons bringing milk to the factory to be manufactured into cheese; where the arrangement between the parties is that the milk brought by each person shall be weighed as delivered at the factory, run into receiving vats and made into cheese; and when the cheese is sold, the money shall be divided among the customers, according to the quantity of milk furnished by each, after deducting the cost of manufacturing. It is not necessary that a statute giving a pecuniary penalty or forfeiture, should in terms direct in whose name the action for its recovery shall be brought. When it is given to a party injured or aggrieved by the act, or omission of another, such party, in the absence of any provision to the contrary, may bring the action for its recovery in his own name (*Thompson* agt. *Hove*, 46 *Barb.* 287).

12. Upon a policy of insurance against fire, issued to A., loss, if any, payable to B., the latter may maintain an action in his own name. The cases of *Grosvenor* agt. *Atlantic Fire Ins. Co.* (17

N. Y. 391); *Freeman* agt. *The Fulton Fire Ins. Co.* (14 *Abb. Pr.* 398); and *Fowler* agt. *New York Indemnity Ins. Co.* (26 *N. Y.* 425), explained (*Frink* agt. *Hampden Ins. Co.* 1 *Abb. N. S.* 848).

PARTITION.

1. The fact that one of the parties interested in the partition of an estate is an infant, lunatic, &c., will not deprive other parties in such interest of their right to a partition and sale of the premises so held in common by them. But, before the interest of the infant or lunatic therein can be disposed of, and his title be vested in a purchaser, he must, in some proper form, be brought before the court, and his rights be passed upon and protected. If, in bringing the ward into court, or in the proceedings before the court, there has been any irregularity, that may be cured by subsequent amendment under the order of the court having jurisdiction of the parties and the subject matter (*Rogers* agt. *McLean*, 34 *N. Y. R.* 536).

PARTNERS AND PARTNERSHIPS.

1. Loans of money by a special partner, upon securities or otherwise, to a limited partnership, for partnership purposes, or for enlarging the means of carrying on the business, are expressly permitted by the statute. That is, such loans do not come within the statute penalty of making the partnership general (*Walkenshaw* agt. *Perzel*, ante, 233).
2. Whenever a limited partnership is involved, within the meaning of the statute (1 *R. S.* 766, § 20), any creditor at large is entitled to have its affairs wound up, and its assets distributed *pro rata* among those of its creditors who have not obtained a specific lien (*Id.*).
3. It is essential, however, before taking away the control of the assets of a limited partnership from members of the firm on the ground of insolvency, to ascertain whether all who have an interest in their retention of such control are before the court as parties (*Id.*).
4. On the death of a special partner in a limited partnership, which is indebted to him for money loaned for the partnership business, his executors represent him in his individual claim for money loaned, and also represent him as to any interest the estate may

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have in carrying on the partnership (*Id.*).

5. Therefore, it is for such executors to determine, with or without the sanction of the court, whether it is most for the interest of the estate they represent to continue the partnership, or urge their claim for money lent (*Id.*).
6. And in an action by the survivors of the special partners, and all others who may come in, &c., against the general partners, to wind up the partnership on the ground of insolvency, and for a receiver, &c., the executors of the special partner should be made parties; and as they may represent conflicting interests of the testator as to carrying on the partnership business, or destroying it, and enforcing the claim of the testator for advances, they should be made defendants (*Id.*).
7. What is insolvency? It is true that "insolvency" and "inability to pay," are synonymous; but solvency does not mean ability to pay at all times, under all circumstances, and everywhere, on demand; nor does it require that a person should have in his possession the amount of money necessary to pay all claims against him. Difficulty in paying particular demands is not insolvency:
8. *Held*, that the insolvency of the partnership in this case was not so clearly made out as to warrant any interference by the court (*Id.*).
9. Whether two or more persons associating in business, are partners as between themselves, depends upon their intentions, as legally ascertained (*Salter* agt. *Ham*, 81 N. Y. R. 321).
10. Where the articles of copartnership do not give either partner a right to dissolve at will, an allegation by one partner, contained in a pleading, and not responsive to any proposal of his adversary, of his desire to dissolve, is not equivalent to an acceptance of an offer to dissolve, made by the other party a month previous. A provision in articles of copartnership, prescribing a definite period for its continuance, is sufficient, without any prohibition of an earlier dissolution, to prevent either party from dissolving it at will (*Smith* agt. *Mulock*, 1 Abb. N. S. 875).
11. A retiring partner, who releases and assigns all his interest in the good-will of the business of the firm to his copartner, does not thereby relinquish his right to establish and carry on a business similar to that of the late firm, so long as he does no act to mis-

lead customers into the belief that he is carrying on business as the successor of the old firm, or that when dealing with him they are dealing with such successor. Nor does one who was formerly bookkeeper of the late firm, and who, upon its dissolution, unites with such retiring partner in establishing such new business, thereby become liable to an action, by the purchaser of the good-will, for an injunction or damages (*White* agt. *Jones*, 1 Abb. N. S. 328).

See CHEESE FACTORY ASSOCIATION.

PAYMENT.

1. The purchase at a tax sale does not operate to discharge the assessment, or to deprive the owner of his equity of redemption under the statute. Where a mortgage provides that the mortgagor shall pay the taxes and assessments upon the mortgaged premises, and, in default of so doing, that the mortgagee may discharge the same, and collect them as a part of the mortgage, the failure of the mortgagor to pay the taxes is not such a breach of the condition of the mortgage as will give the mortgagee the right to foreclose and collect the whole amount secured. Where the premises have been sold for non-payment of assessments, and the mortgagee has bid them in, and taken the certificate of sale, he has not thereby paid the taxes on said premises (*Williams* agt. *Townsend*, 81 N. Y. R. 411).

PERFORMANCE.

1. Where, by the terms of an agreement under seal, the plaintiff was to pay a certain sum in cash, and assumed certain mortgages mentioned in the agreement, and to execute his bond and mortgage for the balance, on a particular day, and the defendant, on receiving such payments and the bond and mortgage on that day, was to convey to the plaintiff certain lots in fee, free from all incumbrances, except said mortgages and a certain lease:
2. *Held*, that these several acts were to be performed at the same time, and the obligations of the parties in respect to them were, therefore, mutual and dependent (*Morange* agt. *Morris*, Court of Appeals, ante, 178).
3. Ordinarily, in such case, it is incumbent on each party to perform or tender a performance on his part, in order to put the other party in default (*Id.*)

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five dollars at one sitting, and requires it to be brought within three months after payment, the defendant is entitled to require the plaintiff to specify in his complaint the amount lost at each sitting, and the time of payment. It is not sufficient that these facts might be called forth by requiring a bill of particulars (*Id.*).

3. Where a joint answer of several defendants denies an allegation in the complaint, which the plaintiff must prove to establish his cause of action against some of the defendants, but which he need not prove to entitle him to recover against the others, the answer raises no material issue for the defendants as to whom the plaintiff must prove such allegation (*Bank of Cooperstown agt. Corlies*, 1 Abb. N. S. 412).

4. An allegation in the complaint that the defendants sold the plaintiffs' property for a certain sum, and that they "have had the use of, and interest upon, said money since it was received as aforesaid by the defendants for the plaintiffs' use," is sufficiently controverted by a denial in defendants' answer, that they sold the plaintiffs' property, or that they received therefor any money whatever to the plaintiffs' use (*Robinson agt. Corn Exchange Insurance Company*, 1 Abb. N. S. 186).

5. In an action upon an undertaking an in- to pay ry, if hat the at) was mplaint ndered of the use the aver in ed that entitled merely ecided, as been damned, and that defendant is indebted to him, is not irrelevant, but raises a material issue. Nor is it shown to be sham, by an affidavit stating that the complaint in the injunction suit was dismissed, but not disclosing on what ground (*De Forest agt. Baker*, 1 Abb. N. S. 84).

6. In an action brought in the name of the husband and wife, for damages to the separate property of the wife, the joining of the name of the husband is unnecessary; and, under the 178d section of the Code, it may be stricken from the proceedings, either before or after judgment. It is, therefore, not

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such an error as calls for a reversal of the judgment; but his name will be stricken out, on motion, leaving the judgment to stand in the name of the wife (*Ackley* agt. *Tarbox*, 31 N. Y. R. 564).

PLEDGE.

1. A creditor may assign the principal debt to a third person, and give him the benefit of any pledge which he holds to secure the payment of such debt. So long as nothing is done to deprive the pledgor of the right to redeem on payment of the amount due on the principal debt, the pledgor is not injured (*Chapman* agt. *Brooks*, 31 N. Y. R. 45).
2. Where the vendor of premises already incumbered has taken back mortgages from the vendee upon the several lots conveyed, and, by agreement between the parties, the vendor is not to proceed to foreclose any of said mortgages until the prior incumbrances are canceled by means to be furnished by the vendee, or by the sale of such mortgages, or either of them; and where the vendor has mortgaged or pledged a portion of said mortgages as security for money loaned, and the pledgee forecloses the mortgages pledged, and has a surplus arising therefrom after satisfying his claims against the pledgor, the vendee not having paid to the vendor the moneys agreed to be paid to cancel such incumbrances, or a part of them, is not entitled to such surplus (*Johnson* agt. *Blydenburgh*, 31 N. Y. R. 427).
3. The lien of a pledgee is destroyed by a tender of the amount due (*Haskins* agt. *Kelly*, 1 Abb. N. S. 63).

PRACTICE.

1. Whether the verification of an answer can be made to fulfill the statute requirement of an affidavit of denial annexed to the pleading? *quere* (*The Union Bank of Rochester* agt. *Gregory*, 46 Barb. 98).
2. Where an action is tried without any question being raised as to whether the facts proved are within the pleadings, it is too late, after the decision, to raise an objection that the evidence was not warranted by the pleadings; provided it was otherwise competent (*The Commercial Bank of Rochester* agt. *Shuart*, 46 Barb. 371).
3. Facts proved, but not pleaded, are not available to the party proving

them (*Allen* agt. *The Mercantile Mutual Ins. Co.* 46 Barb. 642).

4. If the acts of the prisoners committing the offense are a part of one and the same transaction, and the offense in law admits of different degrees, they may be convicted of different degrees, though jointly indicted for the same offense. This rule applies, except in indictments for offenses necessarily joint, as, for a conspiracy, riot, etc (*Kline* agt. *The People*, 31 N. Y. R. 229).
5. Where two are jointly indicted for committing a larceny, and one of them pleads guilty of an attempt to commit a larceny, and is sentenced, the other defendant may be lawfully tried for the larceny, and, on conviction, be sentenced to suffer the penalty therefor (*Id.*).
7. A judgment will not be reversed for the admission of evidence which was needless, when it is clear that it was also harmless (*Smith* agt. *Patten*, 31 N. Y. R. 66).
8. Where the defendant holds the affirmative of all the issues made in the pleadings, and opens the case by calling the first witnesses, he is entitled to the closing address to the jury. *It seems*, that the party who alleges the affirmative of any proposition, or of any issue of fact, must prove it; and the party who has to maintain or prove the affirmative must begin the evidence (*Howell* agt. *Chamberlin*, 31 N. Y. R. 611).

PRESUMPTION.

1. The contents of the execution may be inferred from the facts that the law prescribes its form; the attorney issuing it was conversant with such instruments, and the sheriff to whom it was directed knew what it must contain to authorize him to sell the property. In view of such facts, and after a lapse of thirty years, the court may assume that the execution was in due form, containing all such directions as the statute required it should contain. In the absence of proof to the contrary, it is presumed that the officer, in selling property under an execution, complied with all the requirements of the statute (*Leland* agt. *Cameron*, 31 N. Y. R. 115).
2. In general, where the obligation of a third party is received from the debtor by the creditor at the time the debt is contracted, the presumption is, that it is agreed to be taken in payment (*Per SMITH, J.*). Such presumption is

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rebutted by evidence of a contrary agreement or understanding of the parties, which may be inferred from their subsequent conduct in respect to such transaction (*Youngs* agt. *Slade*, 34 N. Y. R. 258).

2. Every intendment is to be in favor of the performance of duty by a notary who certifies to the protest of negotiable paper for non-payment. The certificate should be read in harmony with the performance of official duty, unless the contrary is clearly indicated (*McAndrew* agt. *Radway*, 34 N. Y. R. 511).

PRINCIPAL AND AGENT.

1. There is nothing growing out of the relation of husband and wife, which prohibits the wife from acting as the agent of her husband; and if her acts be approved by the husband, such approval is equivalent to an original authority (*Berwick* agt. *Dusenberry*, ante, 348).
2. When the act done for another is apparently for his benefit, slight evidence should serve to establish a ratification (*Id*).
3. Where, during the husband's absence, his wife, without his authority, hired a house for one year, the rent payable monthly in advance, and entered into possession thereof on the first of May, and on the 6th of May the husband returned and resided in the house with his wife until the 24th of May, when he paid the rent for the month of May, and moved out:
4. Held, that the husband, the defendant, was liable for the rent of the premises for the whole term. If the defendant intended to object to the hiring by his wife, on the ground that she had no authority, he should have acted promptly; his delay was a ratification of her conduct (*Id*).
5. A purchaser of chattels, after having sued the vendor for a breach of warranty in the sale, and been defeated in the action, may bring an action against the agent by whom the sale was made, for a fraud practiced by him on such sale (*Gutches* agt. *Whiting*, 46 Barb. 139).
6. A principal cannot enjoy the benefits of a bargain made by his agent, without adopting the instrumentalities by which he consummated it (*Ehlers* agt. *Chamberlin*, 31 N. Y. R. 511).
7. Where the owners of a vessel employ a master for a voyage, and by parol

authorize him to exercise his best judgment in the disposal of the cargo, and also in the purchase of a return cargo, they constitute him their general and special agent for such purpose (*Bidenlac* agt. *Smith*, 31 N. Y. R. 259).

8. Where a factor was instructed by his principal to sell wheat on consignment at a specified price on a given day, and if not sold on that day to ship the same to New York, the factor must obey instructions, or he will be liable as for a conversion of the wheat. If, on the day he is required to sell, he give a refusal until the next morning, and accordingly perfects the sale on the following day, he will be liable for disobeying the instructions of his principal, and may be treated as having converted the wheat to his own use. Where the gist of the action is for such breach of duty, the rule of damages applicable, is to allow the plaintiff the highest market price of the property prevailing between the time of the conversion and a reasonable time thereafter, within which to commence the action. Where the conversion took place at Buffalo, N. Y., July 13, and navigation between Buffalo and New York closed about the 29th of November, it was held, that the plaintiff was entitled to the highest market price of the property converted as having vested in another. But, it seems, the plaintiff will not be permitted to prosecute his inquiries through the entire period between the conversion and the time when the statute of limitations would attach, for the purpose of discovering the highest price at which such property sold in market (*Scott* agt. *Rogers*, 31 N. Y. R. 576).

See INJUNCTION 4, 5, 6, 7.

PRINCIPAL AND SURETY.

1. Forbearance by a creditor, without any binding agreement to refrain from taking proceedings, will not exonerate a surety. There must be a valid consideration for the agreement, and such as will preclude the creditor from enforcing payment against the surety

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until the expiration of the time specified. Where an agreement was made between the maker and holder of promissory notes, that the former should pay the latter weekly installments upon the notes, until the same should be paid, and that he would assign an account against the county, which had not yet become due, without any new note being given, or new security actually taken; and the holder thereupon agreed that if the maker paid as he proposed, and continued to do so, he would not trouble the indorser: *Held*, that there being no valid consideration for the agreement to extend the time of payment, the terms of the original contract between the maker and the holder of the notes were not changed, and the indorser was not discharged: *Held, also*, that the payment of a single installment, by the maker, was but a partial execution of the contract, and only the payment of what was actually due; and that it could not be regarded either as a consideration for extending the time, or as the actual full execution of the agreement (*Van Rensselaer agt. Kirkpatrick*, 46 Barb. 194).

PROMISSORY NOTES.

1. The defendant made his promissory note for \$1,000, for the accommodation of B. C. & Co., without any consideration, and for the purpose of being discounted for the benefit of B. C. & Co., upon an agreement that it should be paid by them. B. C. & Co. transferred the note to a bank as collateral security for a loan, which loan was afterwards paid, but the note remained in the possession of the bank. B. C. & Co. failed, and having overdrawn their account with the bank about \$6,000, they addressed a note to the bank, requesting that all notes they had deposited for collection as collateral security, might be held by the bank as collateral security for notes of the firm discounted or to be discounted: *Held*, that the bank parted with nothing, gave no credit, relinquished no security, and assumed no responsibility on the faith of the note, and was not a *bona fide* holder, nor entitled to recover the amount thereof of the defendant. A holder of a promissory note not yet due, if he has paid a present valuable consideration, gets a good title to the note, although the person from whom he took it had none. But payment of, or security for an antecedent debt, is not such a consideration (*The American Exchange Bank agt. Corliss*, 46 Barb. 19).
2. In an action upon a promissory note made by the defendants, by which they jointly and severally promised to pay B. or bearer, \$300, three days after date, the defense was that the note was given for the benefit of the plaintiff, and in performance of a usurious transaction, which made the note usurious and void. The evidence showed that the plaintiff purchased of the defendants, for \$280, a note of \$300, made by the defendant T., and indorsed by the defendant W., and also by another person. That note was made for the purpose of raising money upon it. When it was nearly due, the defendants made the note in suit, and the plaintiff wrote upon it a guaranty of the payment and collection thereof. This note was delivered to B., the payee therein named, who payed to the defendants the full amount thereof, in money, less the interest for the time it had to run; i. e., B. lent the defendants the amount of money specified in the note, less the interest which the note would have drawn if it had been made payable with interest. The plaintiff paid the amount of that note to B., before it became due, and received it from him. The defendants paid the money to the plaintiff which they borrowed of B., in satisfaction of the first mentioned note, and insisted that the plaintiff paid the same identical money to B. for the note in suit: *Held*, 1. That B. had the right to deduct the interest on the note in suit, for the time it had to run, because the note did not in terms draw interest. 2. That the transaction was free from usury, as between B. and the defendants, and the note was valid in the hands of B.; and that if he had kept it he could have maintained an action upon the guaranty, against the plaintiff. 3. That granting that the note sued on was made at the request of the plaintiff, and negotiated at his request, to B. by the defendants, and that the money which the latter obtained on it of B., was paid by them to the plaintiff, in satisfaction of a note made by one of the defendants, and indorsed by the other, which was void for usury, in the plaintiff's hands, the transaction did not make the note in suit usurious or void, when it came into the plaintiff's hands. 4. That being valid in its inception, and when it was first negotiated, such note remained valid, and the defendants had no defense to it (*Hawks agt. Weaver*, 46 Barb. 164).
3. Creditors who have taken a new security in the shape of promissory notes, upon extending the time of payment of a debt, shall not, by an alle-

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gation of their own turpitude, set aside the new security, and resort to the original indebtedness. Yet if the debtors themselves take the initiative in avoidance of the new notes, as being usurious, either by defense in a suit upon them alone, or in a suit upon the original security, the plaintiffs may recover upon the original notes. In an action upon promissory notes made by the defendants, the complaint alleged that after said notes matured, the same not being paid, new notes were given for the same amount, and the time of payment extended. That the defendants claimed that the new notes were usurious and void, by reason of an illegal rate of interest being included in them, and that the defendants, therefore, refused to pay them. And the plaintiffs demanded judgment for the amount of the original notes. The defendants by their answer, not only admitted that they claimed the new notes to be usurious, but distinctly set up the usury as a part of their defense. On the trial, the plaintiff's counsel, in opening his case, set forth the transaction as made by the pleadings, and admitted that the new notes were usurious: *Held*, that the plaintiffs, under these circumstances, might resort to the original notes, and recover upon them *The Winsted Bank* agt. *Webb*, 46 Barb. 177).

4. The Bank of S. being indebted to the M. and F. Bank, for moneys collected for the latter bank, and having in its possession, for collection, certain notes and checks belonging to the M. and F. Bank, that bank sent its agent to the Bank of S., to demand payment of the moneys due and a return of the notes and checks. The defendants thereupon stated to said agent that the Bank of S. was embarrassed, temporarily, and requested him not to press his claim by taking legal action for the collection of the debt accrued and to accrue to the M. and F. Bank, and not to withdraw the notes and checks held by the Bank of S. for collection. The agent acceded to this request, and in consideration of his so agreeing, the defendants made and delivered their promissory note to the agent, as collateral security for the debt due from the Bank of S. to the M. and F. Bank: *Held*, that there was a good and sufficient consideration to support this note, in the agreement of the M. and F. Bank not to press its claims against the Bank of S., for the amount of the indebtedness of the latter, and not to withdraw from the Bank of S. the paper left with it for collection (*The Mechanics' and Farmers' Bank of Albany* agt. *Wixon*, 46 Barb. 218).

5. In an action upon a promissory note, it is not necessary for the plaintiff to prove any consideration for the note, as it imports a consideration; and if it is inadequate, or illegal, for any reason, or has failed in whole or in part, it is incumbent on the defendant to prove it. Where, in such an action, it was proved that when the note was executed and delivered, the payee handed the maker money—a roll of bills—the amount of which the witness did not know, but the maker after having counted it, said it was all right: *Held*, that the testimony did not tend to prove that the money paid was less than the amount of the note, but that on the contrary, the legal presumption was, that the money paid was equal to the amount secured by the note; and that until that presumption was rebutted, the jury would be bound so to find (*Sawyer* agt. *McLouth*, 46 Barb. 350).

6. G. being the holder of a promissory note for \$4,875.88, made by B. and P., and payable to his order, indorsed and delivered the same to S., to secure the latter against loss or liability as accommodation indorser for G., on notes and drafts to the amount of about \$7,000, a part of which were held by the plaintiffs, respectively. Subsequently, and before maturity, S. sold and transferred the note to L. P., a *bona fide* purchaser, at a discount of \$200, and the proceeds were appropriated by S. to his own private use, and were not applied to the payment of obligations on which he was liable as indorser for G. L. P. made a formal transfer of the note to M., but such transfer was not an absolute one, and M. held the nominal title of said note merely for the accommodation and benefit of L. P. In an action brought by the plaintiffs to have the note in the hands of M., applied to the payment of the plaintiff's debt against G., according to the purpose for which it was put into S.'s hands: *it was held*, that there was no principle upon which the plaintiffs could sustain the action. That it was entirely competent for S. to convert the B. and P. note into money, by selling and transferring it to L. P. And that after he had sold it and received the money therefor, neither L. P., nor any person to whom he might have transferred it, was responsible for the manner in which S. appropriated the proceeds of the sale. That whether the sale and transfer of the note to M. was absolute or merely formal, was not material; that in either case the note was beyond the reach of the creditors of G., provided the purchase by L. P. was in good

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faith. And that if it was made with any fraudulent or unlawful intent, it was incumbent upon the plaintiffs to prove it (*The Commercial Bank of Rochester* agt. *Shuart*, 46 Barb. 371).

7. C. and B., make their joint and several promissory note for \$1,300, payable to the plaintiff. B. signing the same as surety for C. Subsequently, and after the maturity of the note, B. having failed, the plaintiff applied to C. for further security; whereupon Scott and Colt, at the request of C., severally signed the same note as sureties, which was again delivered to the plaintiff: *Held*, that Colt and Scott, upon signing the note, respectively became jointly and severally liable for the payment thereof with C., the maker, and B., the surety, and liable to be sued thereon, jointly or severally, immediately. The plaintiff elected to treat the note as a joint note, by suing Scott and Colt together, as joint debtors. The defendants, by not pleading the non-joinder of C. and B., as co-defendants, waived the objection. Scott having died, and E. S. having been appointed his administratrix, the court, on motion, ordered her to be substituted as defendant in the place of Scott. Colt moved for a nonsuit, on the ground that the suit could not proceed against him and E. S. jointly: *Held*, that the suit did not abate by the death of Scott, but that under the provision of the statute (1 R. S. part 3, title 1, ch. 7, § 1), the action could not proceed jointly against Colt and E. S. That the action was properly revived and continued as against E. S.; but that this did not entitle the plaintiff to proceed with the action jointly against Colt and E. S. That the order substituting E. S., in the place of her intestate, should be construed as allowing the suit to proceed against her separately, in the same manner, and with the same effect, as if she had been separately sued, or Scott had been separately sued in his lifetime. That this prevented the statute of limitations from attaching and cutting off Scott's estate from liability on the note, and accorded with and carried out the design and intent of section 121 of the Code, to save the rights of parties in such cases. That when brought into court under the order, E. S. had the right to object to further joint proceedings against her with Colt, and to object to the recovery of a joint verdict and joint judgment against her; and that the plaintiff might have been required to elect as against which defendant he would proceed, or have been allowed to sever in the action, according to section 274

of the Code, at any time before the trial; but that a joint verdict against the defendants, to be followed by a joint judgment, was erroneous (*Mo-Vean* agt. *Scott*, 46 Barb. 379).

8. In an action upon a promissory note, the defendants set up as a defense that the note had been paid, by the assignment to the plaintiff of the defendant's interest in a mortgage, and a guaranty of the payment thereof, under an arrangement that the assignment should operate as a payment. On the trial, the plaintiff alleged, in answer to the defense, that it was induced to take the mortgage by the fraudulent representations of the defendants; that the mortgaged premises were free of all prior liens, except one specified, when in fact they were incumbered by another, of still larger amount, which had since been foreclosed, and the lien of the mortgage assigned thereby cut off: *Held*, that the plaintiff could not take advantage of such fraud, because it had made no offer to put the defendants in *statu quo*. That before it could avail itself of the fraud to avoid the affect of the contract by which the note was claimed to have been paid, it was incumbent on the plaintiff to tender back the guaranty, and to signify to the defendants that their interest in the mortgage was not claimed under the assignment, and was at their disposal (*The Central Bank at Cherry Valley* agt. *Pindar*, 46 Barb. 467).

PUBLIC RECORDS.

1. A corporator of a municipal corporation has a right to have a general inspection and take copies of the public documents and records of the corporation, under such rules and restrictions as will preserve the safety of the records and prevent any serious interruption of the duties of the *custos* (*People* agt. *Cornell*, *ante*, 149).

PURCHASER.

1. May be compelled to complete purchase, even though there may be a remote possibility of a defect of title, &c. Where, by the statute authorizing the proceedings of sale, &c., the estate of the heirs having a reversion in the lands sold are excepted from the sale, and the purchasers of the fee objected to completing the purchase because of the possible existence of such heirs, the court held that, although such heirs might possibly be in existence, and might assert their title to the reversion when the life estates had ter

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minated, yet the improbability of the existence of such heirs might be such as not legally to affect the title of such purchasers of the fee (*In Matter of New York P. E. School*, 81 N. Y. R. 574).

RAILROADS.

1. If a traveller, in crossing a railroad, is warned of the approach of an engine by the customary signals, or if by other means, he is made aware of its proximity, it is his duty to avoid exposing himself to injury (*Ernst agt. Hudson River R. R. Co. Court of Appeals, ante*, 61).
2. If he advances on the open highway, with no cars in view, and no indication of their approach, either by signal or otherwise, he is at liberty to pursue his way without incurring the imputation of breach of duty to a wrong-doer (*Id.*).
3. The only condition of the right to redress for a wrong of this description is, that the party aggrieved be free from culpable negligence; and he is not chargeable with such negligence, unless he fails to exercise ordinary care and vigilance, to avoid the injury of which he complains (*Id.*).
4. Ordinary care, skill and diligence, is such a degree of care as men of ordinary prudence, under similar circumstances, usually employ (*Id.*).
5. The degree of care which men of common prudence would be likely to observe in a given case must be determined with reference to all the attendant circumstances (*Id.*).
6. The citizen who, on a public highway, approaches a railway track, and can neither see nor hear any indication of a moving train, is not chargeable in law with negligence for assuming that there is no car sufficiently near to make the crossing dangerous (*Id.*).
7. In this case *held*: that the defendants not only misled the plaintiff's testator by not exhibiting the flag at the crossing of the railroad, in accordance with the uniform custom when an engine was near, but also by approaching the highway illegally, neither sounding the whistle or ringing the bell as they advanced. This was an act in open defiance of the public statute enacted for the protection of the traveller (*Id.*).
8. It is not the policy of the law to favor those who deliberately violate its mandates, nor is it the duty of the courts to invent excuses for wrong-doers, or or to palliate the guilt of reckless homicide. Our statutes for the protection of life are to be obeyed, and when they are broken and defied, responsibility is not to be evaded by imputing blame, without proof, to him who suffers death, for the sake of shielding those who inflict it (*Id.*).
9. It is not true that a traveller on a public thoroughfare is guilty of culpable negligence, as matter of law, if he does not stop to listen, or look up and down the track, before he goes over a crossing of a railroad. Whether such an omission is culpable depends upon the facts and circumstances of each particular case (*Id.*).
10. This is an appeal by the plaintiffs in the first above entitled action from the decision of the special term of this court, as reported in 90 *How. Pr. R.* 39 (*Dry Dock, &c., R. R. Co. agt. N. Y. and Harlem R. R. Co. ante*, 193).
11. It was there *held* that, by an act of the legislature in 1826, the title to all lands four hundred feet east of low water mark on the shore of the East river was vested in the mayor, aldermen and commonalty of the city of New York (*Id.*).
12. That the city of New York had a right, under that act, to convey any of the lands embraced within its provisions. And having in 1847 conveyed certain lands under water east of First avenue, except a space of one hundred feet in width eastward from First avenue, and in continuation of Thirty-fourth street, to the Farmers' Loan and Trust Company, with covenants by the grantees, their successors and assigns, to fill up the same, and erect and make a good and sufficient wharf, avenue or street, one hundred feet in width, from First avenue to Avenue A, and keep in good order said street, wharf and avenue, which should thereafter continue to be a public street of the city; and the Farmers' Loan and Trust Company having conveyed said premises, subject to the same provisions and conditions, to the East River Ferry Company and James M. Waterbury, who are engaged in filling in the land owned by them, including said continuation of Thirty-fourth street, one hundred feet wide to Avenue A, in pursuance of the original grant from the corporation:
13. *Held*, that upon the completion of the work, and when the land was filled in, graded, regulated and paved, for the purposes of a public street, it was the intention of the city, who made

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the conveyance, to dedicate it as one of the public streets of the city. But it was no part of the contract that it should be thus appropriated while the work was in progress, and during that period the title to the property remained in the corporation, while the right to its possession and control, and its use for the purposes intended, was in the grantees who had contracted to perform the work, until its completion, its adaptation to the public use, and some act done evincing the entire fulfillment of such contract, and discharging the parties who had agreed to perform the work, and from the obligations imposed upon them: Therefore, until the fulfillment of such contract, and the finishing of the street, no railroad company had any right to enter upon the premises and disturb the possession of the grantees. And upon their doing so, a remedy existed by injunction (*Id.*).

14. The general term on this appeal *held*, that it appeared from the papers in this case that Thirty-fourth street, or the strip of land one hundred feet wide to a point about two hundred and seventy-seven feet easterly from the easterly side of First avenue, and to which the ferry house had been removed, had been so far filled out and graded as to be constantly used by the public in going to and from the ferry, and for common highway purposes generally. Therefore, either of the railroad companies had a right, as to Waterbury and the ferry company, to construct and extend their tracks through and over Thirty-fourth street, as far easterly as the grading or condition of the street would permit. The injunction at the suit of Waterbury and the ferry company, restraining the railroad companies, should be vacated with costs. (CLERKE, *J.*, dissenting.) (*Id.*)

15. It was also *held* by the special term, that, by the act of 1849, the New York and Harlem Railroad Company were authorized to construct a branch from their railroad to the East river, to such point as might be designated and permitted by the corporation of the city of New York; and that in March, 1864, the corporation selected a point on the East river to which the said railroad might be constructed, and gave the requisite permission to extend their road through Thirty-fourth street to the East river (*Id.*).

16. *Held*, also, that the act of 1849 must be considered in connection with the permission granted by the corporation in 1864; and as the privileges granted

were bestowed prior to the act of 1860, under which the Dry Dock, East Broadway and Battery Railroad claim to act, the New York and Harlem Railroad Company have precedence in using the space in continuation of Thirty-fourth street, when completed (*Id.*).

17. The general term on this appeal *held*, that before the Dry Dock, East Broadway and Battery Railroad Company actually commenced taking a qualified possession of the center or middle of that part of Thirty-fourth street, or the strip of land, by locating and constructing their extension, either railroad company had a right to make their extension through or along the center or middle of the street or strip, to the exclusion of the other from that particular location. There was no principle upon which the court could favor the right of either company thus to locate their extension, to the exclusion of the other, before any actual attempt at such location (*Id.*).

18. But the Dry Dock, East Broadway and Battery Company, by first actually taking a qualified possession of the center or middle of the street or strip of land, by locating and constructing their extension as far as they did, until interfered with by the agents or servants of the Harlem Railroad Company, acquired the right to complete the construction of, and to operate, their extension to the ferry, or as near to it as the condition of the street or strip of land and the convenient operation of the ferry would permit, to the exclusion of the right of the Harlem Railroad Company to interfere in any way with the construction or operation of the Dry Dock, East Broadway and Battery extension, as thus located. The order in this action between the railroad companies, and in which Oliver Charlick and the ferry company were parties defendants, should be reversed, and the injunction which was vacated by it restored and continued, with costs to the plaintiffs, to be paid by the Harlem Railroad Company. (CLERKE, *J.*, dissenting.) (*Id.*)

19. The Hudson River Railroad Company have no authority, either with or without the consent of the corporation of the city of New York, to extend their tracks from Chambers street through College Place and Warren street to Broadway, in the city of New York (*People agt. Hudson River R. R. Co. ante*, 394).

20. It cannot be stated as a general rule

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that a passenger who leaves a railroad car while in motion, and is thereby injured, is guilty of negligence as a matter of law (*Mettestadt* agt. *Ninth Av. R. R. Co.* ante, 428).

21. Where a boy about fourteen years of age was riding upon the top of a city railroad car, as a passenger—the car being full inside—having paid his fare, and, on arriving at the corner of a certain street, requested the driver to stop, as he wished to get off, but the driver did not stop, and on going about half the block at a moderate speed, the boy undertook to get off the car, and in doing so the driver caught him by his head, pulled off his cap and struck at him with his whip, and in attempting to avoid the blow from the whip the boy fell under the car and had one foot run over and severely injured:
22. *Held*, that these facts appearing in evidence on the trial, the case should have been submitted to the jury. A judgment of dismissal of the complaint, on the ground that the getting off the car while in motion was negligence on the part of the plaintiff, reversed, and a new trial ordered, with costs to abide the event (*Id.*).
23. A railroad franchise may be conferred upon a corporation. It follows that the legislature can constitutionally bestow grants of this kind. The constitution contains no prohibition and no restrictions on this power (*N. Y. and Harlem R. R. Co.* agt. *Forty-second Street, &c., R. R. Co.* ante, 481).
24. There is no constitutional provision that prohibits railroad franchises being conferred upon or exercised by individuals, nor does there appear to be any objection to making such rights assignable (*Id.*).
25. No question can now arise as to the power of the legislature to authorize the construction of a railroad upon any of the streets of the city of New York, without any compensation to the corporation, or to the owners of property fronting on the street, and without the assent of the corporation, but even in direct opposition to the wishes of the corporation. (*The Case of People* agt. *Kerr*, 25 How. p. 258, *Court of Appeals*, settles this point.) (*Id.*).
26. If a railroad corporation construct their road in the city of New York, under an act of the legislature, without the assent of the city corporation, conceding such assent to be necessary, another railroad corporation that claims to be injured by the construction of the former road cannot take advantage of such want of assent of the city corporation, as they cannot be injuriously affected thereby; and the requirement of such assent is not for its benefit (*Id.*).
27. The legislature having, by the act of 1860, authorized the construction of the defendant's railroad, and having prohibited the city corporation from giving any assent to any company deriving any authority under the general railroad act of 1850 to construct a railroad on the route of the defendant's road, must be considered as having repealed the requirement of such assent for a road on that route (*Id.*).
28. There is no privilege or right directly granted to the plaintiffs of the sole and exclusive use of Fourth avenue for a railroad track. With reference to the defendant's road crossing plaintiffs' track, it is not such an infraction of private property as to call for a preliminary injunction (*Id.*).
29. A railroad company, in the construction and running of its road, is bound to exercise all the care and skill which human prudence and foresight can suggest, so far as regards its passengers. And this care extends to all measures necessary and proper to secure the safety of the train and passengers, as well as to the care and management of the train itself. Although the statute has imperatively required certain things to be done, such requirements are not necessarily the full measure of the care, &c., required on the part of the road in the discharge of its duties to the public. It is gross negligence for the servants of the defendant to run over any part of their road known to be frequented by cattle, at full speed, unless that part of the track is properly guarded from that invasion. (*Per PECKHAM, J.*) (*Brown* agt. *New York Central R. R. Co.* 84 N. Y. R. 404).
30. Railroad companies are required to erect and maintain fences on the sides of their roads, and to construct cattle guards at all road crossings, suitable and sufficient to prevent cattle, horses, sheep and hogs from getting on such railroad track. The fact that the road crossing is at or near the depot, and that to make such cattle guard there would inconvenience the company, will not excuse them from complying with the positive requirements of the statute (*Bradley* agt. *Buffalo, New*

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York and Erie R. R. Co. 84 N. Y. R. 427).

See ACTION.

RECEIPT.

1. It is competent for parties to a receipt to show for what purpose it was given, to what fund it referred, and to inquire into the consideration. So far, at least, a receipt may be explained by parol. Where plaintiffs, in their complaint, state the facts in regard to a settlement at which a receipt in full was given by them, and allege that one item was not included in such settlement, and was not intended to be, a foundation is thereby laid for an investigation into the real merits of the transaction, and to authorize a proper adjudication in regard to the receipt (*Colburn* agt. *Lanning*, 48 Barb. 37).

RECEIVER.

1. The receiver of the debtor's property appointed in supplementary proceedings, and after the goods had been levied upon by another creditor, holds subject to such levy, and will be liable upon his promise made to the officer to sell and apply proceeds, &c., upon the execution levied. The plaintiff in execution, acquiescing in the promise made to the officer, &c., may maintain an action upon the same. The title of the receiver only relates back to the date of the order appointing him. The issuing and service of an order instituting proceedings supplementary to execution create no lien against other creditors who, in the meantime, discover property subject to execution, and levy upon the same (*Becker* agt. *Torrance*, 31 N. Y. R. 631).

REDEMPTION.

1. The mode of obtaining title to land sold under execution is wholly a creation of the statute, and its provisions must be strictly followed (*Per Wright, J.*). Since the act of 1847 (*ch. 410*), a redemption by a creditor, on the last day of redeeming, to be valid and effectual, must be made at the office of the sheriff of the county in which the sale took place (*Gilchrist* agt. *Comfort*, 84 N. Y. R. 235).

REFERENCE.

1. Where an action for breach of covenant to repair involves the examination of a long account, it may be referred (*Hatch* agt. *Wolfe*, 1 Abb. N. S. 77).

2. The referee has nothing to do with the question of costs in an action to recover a money demand on contract. The report of a referee must contain his findings of fact and conclusions of law, and no judgment should be entered upon the report before these are filed (28 Barb. 462). If his report is general, a further report may be required by motion (*Tilman* agt. *Keane*, 1 Abb. N. S. 28).

3. The practice of referring motions to vacate orders of arrest, to be determined by referees, is objectionable. Such motion should be determined by the judge, upon the affidavits presented (*Huelet* agt. *Reyns*, 1 Abb. N. S. 27).

REHEARING.

1. An order made upon motion, in a special proceeding, is not a proper subject for a rehearing (*Matter of Livingston*, Court of Appeals, ante, 20).

2. It is questionable whether a rehearing upon the merits, in a special proceeding, can be granted since the Code of Procedure, except upon an appeal to the general term (*Id.*).

3. The power to grant a rehearing cannot be arbitrarily exercised; and if the judge grants it upon insufficient grounds, it is an error which the appellate court will correct (*Id.*).

4. The practice of one judge rehearing a matter decided by another judge animadverted upon and condemned, and held, that it should be prohibited by positive enactment (*Id.*).

5. The practice of amending and antedating orders, in a peculiar case, discussed and condemned, and the facts set forth (*Id.*).

6. Where it was evident that an order removing a trustee was not published by the justice until a certain date (April 12th, 1865), held, that such order could not take effect prior to that time, by force of another order, made afterwards (*Id.*).

7. Where an order of discontinuance was vacated upon insufficient grounds, the facts discussed, and the order vacating such order reversed, and the order of discontinuance affirmed (*Id.*).

8. When one judge of the supreme court overrules the decision of another judge, under pretext of a rehearing, upon substantially the same state of facts, and when orders are made, subsequent thereto, by which a valid settlement and final discontinuance of

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the proceedings were avoided, upon grounds which were not only false in fact, but insufficient in substance, it involves a principle which affects the administration of justice in this state, and presents a question eminently proper to come before the court of appeals for review (*Id.*).

9. In such a case, the court of appeals have power to examine the whole case upon the merits, and to make such order in the premises as it shall deem suitable and proper, in view of all the circumstances (*Id.*).
10. The rules and practice of the courts have been established to protect the rights of parties, and constitute a part of the equitable jurisprudence of this community (*Id.*).

RELIGIOUS CORPORATIONS.

1. The allegations of the petition of a religious corporation, presented to the court for an order to sell and convey their real estate, which states that their receipts and income are insufficient either to provide for the payment of their liabilities, or to meet current expenses, is not to be deemed untrue where it is shown that the current expenses and interest account of the corporation run behind their receipts at the rate of \$3,000 per year, even if it is claimed that a great part of the indebtedness of the church is held by members of the church, who have never called for interest upon such indebtedness, they never having released their right to claim interest (*Madison Av. Baptist Church agt. Baptist Church in Oliver Street, ante, 335*).
2. Where such petition alleged that the plan or terms of the projected union (of the two churches, plaintiffs and defendants) being agreed on by a joint committee appointed by the corporate bodies respectively, it is not to be deemed untrue, so as to deprive the court of jurisdiction, where it appears that at a corporate meeting the plaintiff's corporation (who allege the invalidity of the appointment) adopted and ratified the action of its committee appointed to confer with the committee appointed by defendants, which agreed on the plan in question. In such case, the matter stands as if the plan of union had, without the intervention of a committee, been proposed in the first instance at such corporate meeting, and then adopted (*Id.*).
3. To constitute a corporate meeting, whose acts and resolution shall be

binding, there need not be present a majority of the corporators. Where the corporators are indefinite, such of them as assembled pursuant to regular call will constitute a quorum for the transaction of business, and a majority of such quorum can pass a resolution (*Id.*).

4. The fact that some persons were present at the meeting who were not corporators will not vitiate the proceedings of the meeting, unless it appears that such persons voted, and that their votes were necessary to carry the resolutions which were passed (*Id.*).
5. Whether the number of pew hirers was more or less than the number stated in the petition, was of no consequence, since the allegation as to consent of the pew hirers might be stricken out of the petition without affecting the jurisdiction of the court (*Id.*).
6. Where, although it might be that a majority of the whole number of the plaintiff's corporators did not affirmatively authorize the proceedings, yet the evidence did not show that more than four or five objected. The corporate meeting was, therefore, ample authority for the trustees to make the application to the court; and the trustees having under that authority passed a resolution directing the application to be made, it was unnecessary to show an authority by a majority of the whole number of corporators (*Id.*).
7. A person disturbing a religious meeting, and interrupting its order and decorum, may be removed therefrom by the application of force sufficient for that purpose. To justify the application of force for the removal of a person interrupting the order and decorum of such meeting, it is not necessary that the disturbance should be willful. It seems that, in Catholic meetings, it is appropriate that the priest, as the presiding officer of the meeting, should preserve order and rebuke all violations of it (*Wall agt. Lee, 34 N. Y. R. 141*).

REMEDY.

1. A remedy does not attach to a contract, or a right, but may be repealed or modified. And a statute altering the remedy given by a former statute simply changes the mode in which a contract, or a right, may be enforced (*The People ex rel. Waldron agt. Carpenter, 46 Barb. 619*).

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REMOVAL OF CAUSES TO UNITED STATES COURTS.

1. An action brought by an assignee of a claim for damage for the breach of a contract of a common carrier to carry goods is an action by an assignee of a promissory note or chose in action, within the meaning of the judiciary act, and cannot be removed into the circuit court of the United States (*Ayres* agt. *Western R. R. Co.* ante, 351).
2. Where a defendant has been served with process in a state court, and, before filing his bond and petition for the removal of the cause, his attorney obtains an *ex parte* order extending the time to answer, although such extension is obtained for the purpose of making the application of removal, and the attorney serves the order upon plaintiff's attorney, indorsing it with his name as "Defendant's Attorney:" *Held*, that the defendant had submitted to the jurisdiction of the state court, and had lost the right to remove the cause, although his appearance was subsequently entered within the required time in the state court, and the bond and petition there filed for removal (*BARNARD, C. J., dissenting.*) (*Id.*).

REPLEVIN.

1. Where goods come rightfully into the defendant's possession, as mere bailee in good faith, and they are subsequently wrongfully detained, it is necessary to allege a demand for their delivery, in an action for their wrongful detention (*Purves* agt. *Moltz*, ante, 478).
2. Where goods come to the possession of a defendant by a mistake, of which he is aware at the time, and he subsequently, through voluntary repairs upon the same, claims a lien thereon, for which he detains the same, he is a wrong-doer from the beginning. Consequently, he is liable in an action for the wrongful taking and detention, and no demand for delivery is necessary to be alleged (*Id.*).

RIOTS.

1. The act of the legislature, entitled "An act for compensating parties whose property may be destroyed in consequence of mobs or riots," passed April 13, 1855, is constitutional. Judgments rendered pursuant to the provisions of that act, for riot damages, have the same force against the pro-

perty of the city as judgments recovered for any other cause of action (*Darlington* agt. *The Mayor, &c., of New York*, 31 N. Y. R. 164).

RIPARIAN OWNER.

See LICENSE, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12.

ROCHESTER CITY.

1. The provisions of the charter of the city of Rochester (*Laws of 1861, ch. 148*), giving to the common council power to make, continue, modify and repeal such ordinances, by-laws, &c., as it may deem desirable, to prevent the lumbering of streets, aqueducts, wharves, basins, slips, &c., in any manner whatever; to preserve the Genesee river, and all canals, slips and basins in the city; to prevent and punish the casting or depositing therein any logs or other floating matter, &c.; to prevent and remove all obstructions and accumulations of rubbish, &c., therein, and to punish the authors thereof, &c.; and to impose such penalties, not exceeding \$100, for any offense against any such ordinance; and declaring that "nothing in this section contained, shall be construed to authorize the common council, or any of its officers, to interfere with any of the laws of this state, &c., or with the acts and regulations of the canal board in relation to the Erie canal, or any other canal," &c., were obviously designed by the legislature to confer upon the common council the power to make and enforce certain rules, regulations and ordinances, which they should deem necessary and proper, to preserve the health of the city, and to maintain public peace and good order therein (*The People ex rel. Parsons* agt. *Bryan*, 46 Barb. 355).
2. Accordingly, *held*, that an ordinance declaring it unlawful for the owner of any saw logs, timber or lumber, or for their agents, to keep or cause to be kept (with the exception specified), any saw logs, timber or lumber of any kind, in the Erie canal feeder, or any private or public basin adjoining the same, in the twelfth ward of the city, and giving a penalty of \$100 against any one who shall be guilty of violating the above provisions, was plainly within the powers of the common council, thus conferred by the charter: *Held*, also, that the concluding clause of the section of the charter, above recited, was designed simply to prevent a conflict of the city regulations

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and ordinances with the canal laws, or the acts and regulations of the canal board: *Held, further*, that the police justice of the city of Rochester, under the sixty-fifth section of the city charter, which makes it his duty to attend to all complaints of a criminal nature which may come before him, has jurisdiction to hold cognizance of a complaint for a violation of the ordinance above mentioned (*Id*).

SAFETY FUND BANKS.

1. Safety fund banks, subject to the provisions of the act of 1829, were not authorized to take more than six per cent interest in advance, on paper discounted in the ordinary course of business, which became payable within sixty-three days of the time at which it was discounted. Where such bank discounted paper payable in thirty-five days, and reserved therefor in advance seven per cent interest, it was *held*, that the transaction was illegal, and that the indorser of such paper was not liable thereon (*Bank of Salina* agt. *Alvord*, 31 N. Y. R. 473).

SALE.

1. A sale of property, at a fair valuation, by a failing debtor to his creditor, in payment of a subsisting and honest debt, which has not yet matured, is not fraudulent in respect to his other creditors. A debtor is not permitted to hinder or defraud his creditors; but, as between those who have no legal priority, he is at liberty to pay them in such order as he prefers, if he reserves no benefit to himself. When the good faith of a purchase is sought to be impeached, the purchaser may be examined as to the intention with which it was made. The refusal of a new trial on the ground of surprise, is not subject to review in this court (*Bedell* agt. *Chase*, 34 N. Y. R. 386).
2. On the sale by one person of a judgment recovered by another, a warranty of title is implied, embracing also a warranty that the judgment is due and unpaid, where nothing is said upon the subject. Where the defendants, by the terms of the assignment, warranted their title and power to convey the judgment only to the extent of the consideration paid: *Held*, to be taken as a limitation, not upon the extent of the title impliedly warranted, but of the liability of the defendants in case of failure. On the assignment of a judgment, the implied warranty of the amount unpaid, like the im-

plied warranty of title in the sale of personal property, rests upon the presumption of law that the vendor knows the facts which he impliedly warrants. The rule of damage, where the vendor limits his liability to the amount of consideration paid, &c., stated by the court (*Furniss* agt. *Ferguson*, 34 N. Y. R. 485).

3. The court will not set aside a judicial sale on the ground that the guardian of infants, who are interested, failed to attend the sale, unless it be shown that in consequence of such non-attendance the property sold at a less price than it would have brought if the guardian had attended. Where the sale was well attended and fairly conducted, it should not be set aside, even at the instance of infants, unless it is made to appear that upon a resale, their share of the proceeds, after indemnifying the purchaser at the first sale, will be materially increased (*Stryker* agt. *Storm*, 1 Abb. N. S. 424).

SCHOOLS.

1. By the provisions of the act of 1864, principals (teachers) and vice principals (teachers) for the common schools in the several wards in the city of New York, shall be appointed by the Board of Education, upon the written nomination of a majority of the trustees of the ward (*People* agt. *The Board of Education of N. Y.* ante, 167).
2. The actual appointment being thus vested in the Board of Education, it necessarily follows that the power of removal of teachers, is also vested exclusively in said board. Consequently, the Board of Education have the power of deciding when a vacancy in the office of a teacher has occurred (*Id*).
3. Therefore, the tender of resignation by a principal or vice principal, should be directed and delivered to the Board of Education, and not to the trustees of common schools of the ward where such principal or vice principal is acting (*Id*).

SECURITY.

1. Where such obligation is received by the creditor as collateral security, he may proceed to collect the collaterals after the principal debt becomes due and remains unpaid, and he will be chargeable only with the amount collected thereon. Where the debtor subsequently pays the principal debt, without being aware that anything has

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been realized by the creditor upon the collaterals, and the creditor subsequently returns the collaterals, and tenders back the amount he has collected thereon, no action will lie on the part of the debtor to recover back of the creditor the money paid by him on the principal debt (*Youngs* agt. *Stahelin*, 84 N. Y. R. 258).

SERVICE.

1. A defendant having served notice of appeal, the mere service of a notice of argument by the plaintiff, does not preclude him from enforcing payment of the judgment; no stay of proceedings having been given or applied for (*Arnoux* agt. *Homans*, ante, 382).
2. The service of a summons upon a member of a military company, to appear before a court martial, must be made personally, or by leaving such summons at the residence of the party to be served. A service made by leaving the summons at the office or place of business of the party, does not give the court martial jurisdiction of the matter (*In the matter of John H. Lockwood*, ante, 437).

See ORDER OF PUBLICATION.

SET OFF.

1. When mortgagors have proved, in an action for surplus moneys, that the mortgage was usurious and void, as embracing for a part of its consideration a prior usurious bond and mortgage, that proof entitles the mortgagee to have that portion of the consideration of such mortgage which was a valid pre-existing loan of money from him to the mortgagors, set off against their claim for the surplus money for which the action was brought (*McCraney* agt. *Alden*, 46 Barb. 272).

SHERIFF.

1. A sheriff on succeeding in his defense to an action, is entitled to double disbursements, as well as double costs (*Jackson* agt. *Lynch*, ante, 93).
2. When a sheriff, after arresting a debtor on *mesne* process, stands as bail for his appearance, in an action subsequently brought against the sheriff for not producing the body of the debtor, to be taken in execution of the judgment recovered against him, he cannot give evidence of the debtor's insolvency in mitigation of damages. It seems, that in an action against the sheriff for an escape, such evidence

would be admissible; but it is otherwise where the sheriff stands as bail for the debtor's appearance (*Metcalfe* agt. *Stryker*, 81 N. Y. R. 255).

3. A deputy sheriff may be deprived of authority to act as deputy, upon a notice in writing from the sheriff revoking his appointment. Although his appointment must be made under the hand and seal of the sheriff, his dismissal need not be in writing under seal. His authority to charge the sheriff with his acts as deputy, ceases with his notification of the pleasure of the sheriff to determine his deputyship (*Edmunds* agt. *Barlon*, 81 N. Y. R. 495).
4. Such action cannot be supported against the sheriff, when the process by virtue of which the arrest was made, is void (*Carpenter* agt. *Willett*, 81 N. Y. R. 90).
5. Where the sheriff has an attachment granted by a judge of the supreme court, in an action against the defendant, he may seize any property which the defendants have disposed of, with intent to defraud their creditors. Where the plaintiff in attachment has caused the same to be levied upon the property of the defendant, he is not to be deemed, in respect to such property, a mere creditor at large; but one having a specific lien upon the property attached. In an action against the sheriff for wrongfully taking such property, the sheriff, even before judgment in attachment, has a right to show that the title of the purchaser from the debtors was fraudulent and void as against the attaching creditors (*Rinehey* agt. *Stryker*, 81 N. Y. R. 140).
6. A manual interference with the goods of the defendant, is not necessary to constitute a valid levy. Where the sheriff is stayed in his proceedings on the execution and levy made under it, by an order of the court, and he assumes his control as soon as the order is vacated, he will not be deemed to have abandoned his levy during the continuance of the order (*Bond* agt. *Willett*, 81 N. Y. R. 102).
7. Where a sheriff, upon an execution against the body, arrests the defendant, and negligently permits him to escape, and then returns upon the execution that the defendant cannot be found in his county, this is a false return. Such a return fixes the bail, and cannot be questioned in an action against them, upon their undertaking. It can only be questioned in an action directly against the sheriff, for a false

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return. Such an action may be brought by the bail, upon an allegation that in consequence of the sheriff's false return, they were charged as bail, and compelled to pay the judgment. The rule is the same, where, although the evidence does not authorize the court to assume that an arrest was in fact made, it clearly appears that one might and should have been made. (*Per Johnson, J.*) (*McArthur* agt. *Pease*, 48 Barb. 423.)

8. The neglect of a sheriff to return an execution put into his hands for collection, is an omission of an official duty, within the statute requiring an action against a sheriff upon a liability incurred by the doing of any act in his official capacity, &c., or by the omission of an official duty, to be brought within three years. The cause of action for omitting to return an execution, accrues the moment the sixty days, within which it is to be returned, have expired. The duty is imposed by statute, and the mere omission to perform it creates the right of action. No attachment, or notice to the sheriff to return an execution in his hands, is necessary to give the party his right of action (*Peck* agt. *Hurlburt*, 46 Barb. 559).

SIGNATURE.

1. The subscription of the name of an attorney issuing a summons is not required to be made by himself personally, but it may be made by another, with his authority. It necessarily follows that his name may be printed, as a substitute for his written signature. (*This agrees with the case of The Mutual Life Ins. Co.* agt. *Ross*, 10 Abb. 260, and is adverse to the case of *The Farmers' Loan and Trust Co.* agt. *Dickson*, 17 How. 477). (*Brainard* agt. *Heydrick*, ante, 97.)
2. It is well settled, that where a person is in the habit of using documents with his name printed thereon, this will be his signature within the meaning of the statute of frauds (*Id.*).
3. The name of an attorney issuing a summons is as effectually disclosed when it is printed as if it were written, and his responsibility to the defendant and to the court, in either case, is the same (*Id.*).

SOLDIERS.

1. Where the electors of a town, at a special town meeting called for that purpose, voted to raise a specified

sum for each man who should enlist and be credited to the quota of said town, under a call of the President of the United States for 500,000 men; *Held*, that an individual who enlisted, and was mustered in and credited to the town, intermediate the call of the town meeting and the taking of the vote, was entitled to the bounty which the electors voted to raise for volunteers. *Held, also*, that a claim having been made upon the town, founded on such enlistment, which was acknowledged, and the amount of the bounty paid by the town in the obligations of the town issued for that purpose, the question of the liability of the town was then ended and disposed of, and the only question remaining was, who was entitled to the obligations, and to the money afterwards paid thereon (*Carver* agt. *Oreque*, 46 Barb. 507).

2. *Held, further*, that it was no part of the intention of the electors, by their action, to enable any one to speculate, by furnishing a substitute at a less price, and himself receiving the bounty. That the person enlisting was entitled to the bounty; and that he having assigned to another, for a good consideration, his claim to the bounty, giving him an order upon the supervisor of the town for it, the assignee of that order might maintain an action against one who had gotten possession of the bonds issued for the bounty and wrongfully converted them, to recover the possession thereof. *Also held*, that although the recruit enlisted in anticipation of the bounty, and in the expectation that it would be realized by him, yet, after he had performed the conditions on his part, he had an equitable right to whatever the electors should determine to give to volunteers. That this was an equity which he could sell, for a consideration, and transfer to another; and that he having sold and assigned such equity, the moment the proceedings of the town ripened into a legal claim against the town, it vested as such in the assignee (*Id.*).

SPECIFIC PERFORMANCE.

1. In an action for the specific performance of an agreement to convey land, the rule is not as strict now as formerly, in reference to the proof of the exact agreement alleged in the complaint (*Lobdell* agt. *Lobdell*, ante, 1).
2. If the allegations of the cause of action are not unproved in their entire scope and meaning, and the variance

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is not material, and no one has been misled, and especially if no question of variance was raised at the trial, the objection taken on appeal, that the agreement as set forth in the complaint is widely different from that found by the referee, will be disregarded (*Id.*).

3. In an action by heirs at law of an intestate son, claiming a specific performance of an oral agreement for the conveyance of land, against the devisees of the father, one of the defendants, a devisee, cannot be a witness on his own behalf to prove a conversation between the father and son, and in which the witness took part, respecting the agreement by the father to give the son a deed of the property, on the performance of certain conditions (*Id.*).
4. And it is not material whether the witness took part in the conversation or not. The broad objection is that he proposed by his evidence of the confessions or declarations of the deceased father of the plaintiffs (the son) to defeat their title as the heirs at law, and to establish his own title, he being a defendant. If the case does not come literally within the words of the statute (*Code*, § 899), "any transaction or communication had personally by such party with the deceased" father of the plaintiffs, it is within the intention of the statute (*Id.*).
5. It is a rule in equity that a specific performance of an agreement will not be decreed unless the agreement is founded upon a sufficient consideration. The plaintiff must make a meritorious case (*Id.*).
6. *Held*, in this case, that assuming the facts as found by the referee, the case of the plaintiffs was meritorious, and they were entitled to the relief demanded: although there was much doubt whether the agreement as found by the referee was ever made. The case, however, was not destitute of equity. The evidence showed an intention on the part of the father to give the land to his son, when he (the father) should die; and some of the evidence tended strongly to show that he had already given him the land (*Id.*).

STATUTES.

1. Where a statute authorizing towns to subscribe for railroad stock declared that it should be lawful for the commissioner of any town to act, provided

the consent in writing of a majority of the tax payers appearing upon "the last assessment roll" should first be obtained; *Held*, that the term "the last assessment roll," as used in the statute, and in an amendment thereto, had reference not to the passage of said acts, or either of them, but to the roll next preceding the time of acceptance by the town. Where it was declared by a statute (*Laws of 1864, ch. 402*), that "in any case where the commissioner of any town authorized to subscribe to the stock of the Albany and Susquehanna Railroad Company shall have filed in the clerks' offices affidavits of the consent," &c., such proof by affidavits should be valid and conclusive to authorize the subscription to stock, and the issue of bonds, notwithstanding any clerical or other defect in such proof by affidavit; *it was held*, that it was only in cases where the commissioner appointed for a town had authority to act for the town, that the statute had application; and that the legislature did not enact, or assume or intend to enact, that any affidavits which a commissioner might have filed should be valid and conclusive proof to uphold subscriptions and legalize bonds, without regard to their contents and whether the consents of the tax payers had been given or not; but only to cure clerical or other defects in the affidavits or proof of authority filed, in cases where the power had been accepted, the consents in fact given, and, under actual authority, stock had been subscribed for, and bonds issued. The act of March 4, 1860, amending the several acts authorizing town subscriptions to the stock of the Albany and Susquehanna Railroad Company, and the act of April 25, 1864, amending the first mentioned act, did not assume to repeal the conditions precedent imposed by the acts of 1856 and 1857, or to invest a town with power, or its commissioner with authority, to act without the assent of the tax payers therein required (*The Town of Duaneburgh agt. Jenkins, 46 Barb. 294*).

2. The omission of the county judge to designate, under the laws of 1851 (*ch. 444*), at what terms of the sessions a grand or petit jury shall be required to attend, does not deprive a court of its authority, as such, to impanel a grand jury at any of its terms. The law of 1851 (*ch. 444*) is so framed that, in the absence of a designation of any terms to be held without a jury, the general provisions of law respecting the drawing and summoning of juries will take effect, and will require a jury

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to be drawn and summoned at every term. (*See Laws of 1847, ch. 200, § 42.*) (*Cyphers agt. The People, 31 N. Y. R. 373.*)

2. Under the statute (*Laws 1847, ch. 455*), giving a remedy for the under-valuation of land by the highway commissioners, it is not essential that the justice who issued the summons for the jury should certify their verdict. The statute, in that respect, is merely directory, and the verdict may be certified by another justice, &c. Remarks upon the nature of directory statutes, by LEONARD, J. (*The People agt. Supervisors of Ulster County, 34 N. Y. R. 238*).

STATUTE OF FRAUDS.

1. Where the statute requires an undertaking to be entered into by sureties, in order to give a right of appeal, an instrument containing the requisite stipulations is valid, although it does not express a consideration, and is not under seal. The statute of frauds applies only to common law agreements, where the consideration was the subject of mutual agreement between the parties. It does not apply to instruments created under, and deriving their authority from, special statutes, without the acceptance or assent of the party for whose benefit they were given. There is no form for the undertaking given on appeal from the judgment of a justice of the peace (*Doctifle agt. Denton, 31 N. Y. R. 350*).
2. An oral agreement, by which the tenant, under a written lease for five years, relets a portion of the premises to his landlord for the same term, inures under the statute of frauds, as a demise from year to year (*Lounsbury agt. Snyder, 31 N. Y. R. 514*).

STATUTE OF LIMITATIONS.

1. In an action brought by an assignee of a note, the plaintiff may raise the objection that a set-off against his assignor (the payee), averred in the answer, is barred by the statute of limitations. The right which the payee of a note possesses, to set up the statute of limitations against a demand of the maker urged as a set-off, may, with great justice, be deemed an incident to the note, its principal, and as passing with it to the assignee thereof. There is no substantial reason why the benefit of the statute of limitations should not be extended to the assignee or transferee of any assignable de-

mand, &c. (*Per CLARK, J.*) (*Thompson agt. Sickles, 45 Barb. 48.*)

2. A promissory note for \$1,000, made by H. on the 17th of April, 1857, payable to the order of T., ninety days after date, with interest, at the Bank of N., and indorsed by T. & M., was discounted by the Bank of N., and the money was received by H. The note not being paid when it became due, it was protested, and T. was duly charged as indorser. The plaintiff paid to the bank the amount due upon the note, and became the owner thereof, on the 8th of June, 1858. H. assigned his property for the benefit of his creditors on the 29th of June, 1857. Soon after the note matured, T. paid one-half of the amount due thereon to the Bank of N. On the 1st of January the assignees of H. made a dividend of nine per cent on the debts and paid \$90 to T., to be applied on the note. T. kept \$45 of that dividend and took the other half (\$45) from the Bank of N., and paid it upon February 18, 1858, informing H. that the \$45 was a dividend by the assignees of H. to apply on the note, and that he paid it to the bank as such. The cashier indorsed the \$45 as paid by T. This action was commenced by the plaintiff as holder, against T. as indorser, February 18, 1864. Held, that T. paid the \$45 on the note, within six years next before the time of the commencement of the action, under circumstances that warranted the judge in holding that he then intended to recognize his liability to pay the entire note, and which he was willing to pay. The law respecting the effect of a payment on a question as to taking a case out of the operation of the statute of limitations has not been changed by the Code. And the language of the authorities is that a payment which will take a case out of the operation of this statute must be made under circumstances to warrant a finding, as a question of fact, that the debtor intended to recognize the debt in question as subsisting, and which he was willing to pay. (*Per BALDWIN, J.*) (*Affler agt. Talcott, 46 Barb. 157*).

2. Where an execution, returnable within sixty days from the time of its receipt by the sheriff, was put into his hands on the 5th of July, 1859, and a levy then made; Held, that the sheriff was in default for not returning the execution, and a cause of action accrued against him, therefor, on the 4th of August, 1859; and that an action for such omission of duty, not commenced until the 9th of October, 1864,

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was barred by the statute of limitations. In such an action, under the statute, proof that within three years prior to the commencement of the suit the defendant had suppressed the execution, and suffered the property levied on to go to waste, will not affect the rights of the parties. When the statute has once commenced running, it will continue to run until the time limited expires. It will not stop, and commence to run anew, upon the happening of any particular omission of duty, of the same character, but differing in degree (*Peck* agt. *Hurlburt*, 46 Barb. 559).

4. Where there is a legal and equitable remedy in respect to the same subject matter, the latter is under the control of the same statute bar as the former. But where the legal remedy is imperfect, the statute bar applicable to equitable remedies will be applied (*Rundle* agt. *Allison*, 34 N. Y. R. 180).

STAY OF PROCEEDINGS.

1. On an appeal from a judgment entered by the direction of a single justice of the marine court, to the justices thereof at general term, security may be given by the appellant, which will operate as a stay of proceedings, according to the provisions of the Code (*Roberts* agt. *Donnell*, 31 N. Y. R. 446).

STREETS.

1. Where one claims land as having been conveyed to him by implication, as being a part of the street adjoining the premises described in his deed, he cannot also insist that the land is not subject to a servitude as such street. It is only by assuming that it is a street, that he acquires any title to the land therein. And being part of a street, his title is subject to the easement over it (*Wood* agt. *The City of Williamsburgh*, 46 Barb. 601).

See RAILROADS.

STOCKHOLDERS.

1. Where all the stockholders of a corporation execute and deliver to a creditor thereof their joint and several promissory notes for money loaned to and used by the corporation, as between themselves, they are co-sureties for the company. One of their number, paying the note when it became due, may call upon his co-securities for equal contributions as makers of

the note; and their liability is not to be measured by their relative amounts of stock in such corporation (*Coburn* agt. *Wheelock*, 34 N. Y. R. 440).

2. The organization of a banking corporation, and the subscription of the defendant to the capital stock thereof, creates a legal liability on his part to pay the corporation the amount of his subscription. The capital stock of a bank is a trust fund for the security of its creditors; and the legal liability of a subscriber to its capital stock may be enforced to the extent necessary to liquidate its debts (*Dayton* agt. *Borst*, 31 N. Y. R. 435).

SUBSCRIPTIONS.

1. Where subscriptions are made under an agreement that they are not to be binding unless a specified sum is subscribed, it is essential that there should be no conditions as to the liability of any of the subscribers not applicable to all. Confidential subscriptions, made for the purpose of making up the required sum, are a fraud upon the other subscribers; and should not be treated as valid subscriptions. Where, by deducting such confidential subscriptions, the required sum is not subscribed, the contract of subscription does not become operative, so as to bind the subscribers. Parol evidence is admissible to show that certain of the subscriptions were confidential in character, and, therefore, fraudulent (*New York Exchange Co.* agt. *De Wolf*, 31 N. Y. R. 273).

SUMMARY PROCEEDINGS.

1. To authorize a justice of the peace to issue a summons in summary proceedings for the dispossession of lands, the affidavit produced to him must show that the conventional relation of landlord and tenant exists, and that by an agreement between the parties (*Russell* agt. *Russell*, ante, 400).
2. Where the affidavit states that "this deponent demised, leased and to farm let, to be worked on shares, for the term of one year," it does not show the relation of landlord and tenant existing, and is entirely insufficient to authorize a justice of the peace to issue a summons in summary proceeding. The parties are tenants in common (*Id.*).

SUMMONS.

1. The subscription of the name of an attorney issuing a summons, is not re-

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quired to be made by himself personally; but it may be made by another with his authority. It necessarily follows, that his name may be printed as a substitute for his written signature. (*This agrees with the case of the Mutual Life Insurance Co. agt. Ross, 10 Abb. 260, and is adverse to the case of The Farmers' Loan and Trust Co. agt. Dickson, 17 How. 477.*) (*Brainard agt. Heydrick, ante, 87.*)

2. It is well settled, that where a person is in the habit of using documents with his name printed thereon, this will be his signature, within the meaning of the statute of frauds (*Id.*).
3. The name of an attorney issuing a summons, is as effectually disclosed when it is printed as if it were written, and his responsibility to the defendant and to the court, in either case, is the same (*Id.*).
4. The service of a summons upon a member of a military company, to appear before a court martial, must be made personally, or by leaving such summons at the residence of the party to be served. A service made by leaving the summons at the office or place of business of the party, does not give the court martial jurisdiction of the matter (*In the matter of John H. Lockwood, ante, 437.*).
5. The omission to serve a copy of the complaint together with the summons, where the summons is in the form appropriate for serving both together, and to state in the summons the place of filing the complaint, does not affect the validity of the judgment entered thereon. It is amendable. Where the action is against joint debtors, a part of whom only are served, such defect in the summons is no reason for dismissing proceedings to enforce the judgment against those not served (*Foster agt. Wood, 1 Abb. N. S. 150.*).

SUNDAY.

1. Traveling on Sundays, except for special purposes, and in specified cases, being prohibited by statute, a contract for the hiring of horses and a carriage, made with the knowledge that they are to be used for the purpose of riding on Sunday to a place of resort for pleasure is illegal, and the owner cannot recover compensation for the use of the property so hired. But if the hirer willfully injures the property, or suffers it to be injured through his negligence, the owner may recover the damages he has sustained (*Nodine agt. Doherty, 46 Barb. 59.*).

SUPERVISORS.

1. The act of a board of supervisors in examining, settling and allowing accounts against the county, is a judicial act, and they are not liable in any civil action, however erroneous or wrongful their determination may be; and their decision is binding upon all parties concerned (*People agt. Stocking, ante, 48.*).
2. But where a supervisor acting as a member of the board, knowingly, corruptly, unlawfully and partially, votes that an account presented against the county as a county charge, be allowed, and made a charge against the county, he is guilty of a misdemeanor, and may and should be indicted, tried, convicted and punished (*Id.*).
3. Although the power of a board of supervisors to examine, settle and allow accounts, is in its nature judicial, and that parties interested are bound by the decision in all cases calling for the exercise of judgment and discretion; yet the same board of supervisors may re-examine an account once passed upon, and reject it, or reduce the amount first allowed (*Id.*).
4. The claimant acquires no fixed right until the final action of the board upon his claim; and until he has received the order for the payment of his claim, the board has jurisdiction over it (*Id.*).
5. If a supervisor wickedly abuses, or fraudulently exceeds his powers, he is punishable by indictment, although the board might not have had jurisdiction of the subject matter upon which he acted. It is not essential that any injurious effects should result to individuals from the misconduct of the supervisors (*Id.*).
6. Where, by the statute under which a proceeding is had by a town to raise money for a specific purpose, by the issuing of its bonds, the supervisor of the town is directed to pay on such bonds, in payment of the interest thereon, the money received by him from the county treasurer for that purpose, he cannot question the legality of the bonds, and has no discretion in that respect. In such case, he acts as the agent of the town; and as such agent, he cannot question the authority of his principal (*Ross agt. Curtis, 31 N. Y. R. 606.*).

SUPPLEMENTARY PROCEEDINGS.

1. It is immaterial where the debtor resides at the time the order for his examination is issued; it is sufficient to

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confer jurisdiction, if it appear in respect to the residence of the judgment debtor; that the execution was issued to the sheriff of the county where he then resided or had a place of business, &c (*Jesup* agt. *Jones*, ante, 191).

2. It is not necessary that an order made in supplementary proceedings, directing a third person to pay to the plaintiff the amount of such third person's indebtedness to the judgment debtor, should be served on the latter. If a judgment debtor has notice of an order made by a judge, requiring a debtor of his to appear and be examined as to his indebtedness to the defendant, an assignment of the debt, subsequently made by the judgment debtor, to a third person, will not relieve the claim from an order directing the payment of the same to the judgment creditor. But in the absence of any proof of notice, or of service on the parties of any order restraining the payment of the money, or transfer of the claim, the assignee, if a *bona fide* holder for value, should be protected. If, however, the assignment was made for the purpose of defrauding the judgment creditor, the assignee will have no title. Where the evidence as to the *bona fides* of the assignment is very doubtful, the question should be submitted to the jury (*Lynch* agt. *Johnson*, 46 Barb. 56).

TAXES AND ASSESSMENTS.

1. No relief can be administered in equity, where the remedies at law are adequate for the attainment of justice *Mutual Benefit Life Insurance Co.* agt. *The Supervisors, &c. of New York*, *Court of Appeals*, ante, 359).
2. Where a tax is imposed in this state on the amount of stocks and bonds deposited with the comptroller of this state, by a foreign life insurance company, under the laws of 1851, having an agency and doing business in this state, such company cannot sustain an equitable action against, and restrain by injunction, the proper authorities by which such tax was imposed, from the collection thereof (*Id.*).
3. The assessment of such a tax may be reviewed and corrected by *certiorari*, or be stricken from the roll by *mandamus* (*Id.*).
4. For the purposes of the taxation of his banking capital, the residence of an individual banker, doing business under the general banking law, is in the town or ward specified in the certificate required by the statute as the lo-

cation of his banking office. One assessor alone, cannot make an assessment. It must be the joint act of all, or a majority of the assessors. An assessment made by one assessor only, is irregular and void, and no proceedings for the purpose of charging the owner of the property with a contempt for not paying the tax, can be founded upon it. Neither an associated bank nor the bank of an individual banker, necessarily continues its existence as a banking institution, and liability to taxation as such during the period of six years after the redemption of ninety per cent of its circulating notes, provided by statute for closing its banking business; when it permanently and deliberately ceases to transact regular and accustomed banking business, with a view of calling in its circulating notes, and of ultimately giving the notice provided by the first subdivision of section 1, of the act of 1859 (*chap. 236*). When it thus ceases to act as a bank, it loses its character as such, and is no longer one, except in name. Parties assessed will not be held concluded against alleging any irregularity in the assessment, by reason of their not appearing at a meeting of the assessors, which it does not appear, and is not alleged was ever held, or notice thereof given (*In the matter of Metcalf* agt. *Messenger*, 46 Barb. 325).

5. The fact that a bank owns stocks, bonds and other securities of the United States, in amount exceeding its capital and surplus earnings, and that the total value of all its other personal property does not exceed the amount of the debts it owes, will not exempt it from taxation on account of personal property, on the ground that the capital of the bank is its surplus after paying all its debts, and that in the given case it will require all its personal property, other than its investments in United States securities, to pay its debts; and, therefore, all its capital is in United States securities, which are not taxable. The relator was a bank organized under the general banking law of 1838, with a capital of \$104,000. The cost of its real estate was about \$14,000. Its surplus profits were about \$34,000 or \$35,000, and it had about \$203,500 of United States stocks or bonds, and had about \$65,000 of other stocks deposited as security with the bank department of the state, and about \$120,000 of United States stocks. It held and owned stocks and bonds, and other securities of the United States, to an amount exceeding its entire capital, including all its surplus profits, earnings and re-

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served funds; and the total value of all its other personal property and estate, did not exceed the amount of debts due from the bank. The bank was assessed, on account of its personal property or estate, the sum of \$102,400, being as alleged, the whole amount of its capital stock paid in, and of all its surplus profits or reserved funds, less ten per cent thereof, after deducting therefrom the value of its real estate: *Held*, that the relator not having shown that any of its capital stock was invested in United States securities, or that it was assessed for any part of its property invested in such securities, was not entitled to a writ of *mandamus*, commanding the assessors to amend the assessment, and the assessment roll, by striking therefrom the assessment of the bank for or on account of personal property. The provision of the statute requiring assessors to set down in the assessment roll, the full value of all the taxable personal property of the person, after deducting the just debts owing by him (1 R. S. 391), has no relation to the taxation of moneyed corporations. The effect of the decision of the supreme court of the United States, in the cases of *The People ex rel. The Bank of the Commonwealth agt. The Commissioners of Assessments, &c., in New York*, and *The Same ex rel. The Bank of Commerce agt. The Same* (2 Wal. 200), was neither more nor less than that the state cannot, by any system of taxation, assess and tax the securities of the United States, whether held or owned by corporations or individuals; nor can such holder and owner be taxed on account of such securities, or their value. That decision does not declare the act of the legislature "in relation to the taxation of moneyed corporations and associations," passed April 29, 1863 (*Laws of 1863, p. 435*), to be unconstitutional. The effect of the decision, however, may be to annul the act, and render it inoperative, in cases where the capital of the bank is wholly, or in part, invested in the securities of the United States. In such cases, the statute might, perhaps, be impracticable. Or possibly our courts would hold the statute operative to the extent of the capital stock not invested in United States securities. (*Per MARVIN, J.*) (*The People ex rel. The Lockport City Bank agt. The Board of Education, &c. 46 Barb. 598*).

6. The capital of the Exchange Bank at L. was \$150,000; the value of its real estate was \$7,000; and its surplus earnings, less the ten per cent, were \$41,151.16.

Its state stocks, and bonds and mortgages deposited with the superintendent of the bank department, amounted to \$18,800, and its United States stocks so deposited amounted to \$32,000. Its other bonds and mortgages amounted to \$14,000. It held and owned, in all, \$72,000, United States stocks. The total value of all its personal property and effects, exclusive of the stocks, bonds and other securities of the United States, held and owned by it, did not exceed the sum of \$112,000, over and above the debts due and owing by it. It was assessed on account of its personal property, for \$165,980: *Held*, that the proper mode of assessment was adopted, under the act of the legislature of 1863, relative to the taxation of moneyed corporations, &c.; that is, by taking into the account the capital stock, the value of the real estate, and the surplus earnings less the ten per cent; and that upon this principle the assessment was not excessive: *Held, also*, that it was incumbent upon the bank to show that the assessment included and operated upon a portion of its property invested in United States securities; and that this not having been shown, no case was made for a *mandamus*, directing the assessors to correct the assessment roll for personal property, by reducing the amount therein from \$165,980 to \$112,000 (*The People ex rel. The Exchange Bank at Lockport agt. The Board of Education, &c. 46 Barb. 598*).

7. It seems, the state, or a local division of it acting under the law of the state, seizing and selling lands for non-payment of taxes, or of public charges in the nature of taxes imposed on such lands, acts administratively and not judicially. It seems, in prescribing the mode of proceedings for levying and collecting taxes, &c., the legislature may make use of judicial tribunals and judicial forms, or they may not, as seems most convenient and conducive to the object in view (*In the matter of the Petition of The Trustees of the New York Protestant Episcopal Public School, on the application of Charles H. Davis, Jr. Joseph Beesley, Robert Somerville, James B Warden, 81 N. Y. R. 574*).
8. It is in the discretion of the legislature to provide that the whole or any portion of lands sold for taxes, or charges, &c., made upon the lands, by the laws of the state, &c., shall be sold in fee, or otherwise. The raising of money for local improvements, is an exercise of the taxing power inherent in the legislature; and this power to

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tax implies the power to apportion the tax territorially, as the legislature shall see fit (*Id.*).

9. While it is incompetent for the court to order the sale of lands to raise a fund in anticipation of future assessments thereon, it is competent to order the sale of a quantity sufficient to pay existing assessments, though the legality of a part of such assessments be disputed. Where the order of sale provides, in terms, that the referee appointed to make the sale, shall apply the purchase money, first to the satisfaction of all valid liens upon the property sold, for the purpose of giving to the purchaser an unincumbered title; and, second, that the residue shall be applied to the satisfaction of valid assessments existing at the time of the report of the referee; such an application of the produce of the sale, made before the power of sale had been exhausted, is valid (*Id.*).

10. Where two members of the board of revision and correction of assessments meet and confirm an assessment, without the presence of, or notice to the third, their proceedings are irregular; and the irregularity is not cured by a subsequent formal approval of the minutes when the third member of the board was present, nor by the act of 1861 (*Palmer's Petition*, 1 Abb. N. S. 80).

TENDER.

1. In order to constitute a valid tender, it must be proved that there was a production of the money, and an actual offer of it to the creditor; unless it be shown that the latter dispensed with it by some positive act or declaration. It is not enough that the debtor had the money in his pocket, and informed his creditor that he was ready to pay, without offering to do so; nor that he retained it in an envelope, which was shown to, or shaken at, the creditor. There must be an actual offer or presentation of the money, so that the creditor can take it. Where a creditor, on being informed by a person that he had come to make a tender, referred him to his attorney, saying his office was open and it was but a step, without, however, refusing to receive the money, or interposing any objection, or intimating in any way that the presentation of the money was not required; *Held*, that this did not amount to a waiver of the production and offer of the money. Where the proof as to the actual tender of money is contradictory, and the court finds adversely to the defendant,

if there is some evidence to sustain that finding, it must be considered as final and conclusive (*Strong* agt. *Blake*, 46 Barb. 227).

See PERFORMANCE, 1, 2, 3, 4, 5.

TENANCY AT WILL.

1. The notice to be served by the landlord upon the tenant at will, to determine his tenancy, need not specify the time within which the premises must be surrendered. If a time be specified in the notice served upon the tenant which elapses within less than one month from the time of service of the notice, it will not vitiate the notice. It is sufficient if the tenant has thirty days' notice in writing of the intention of the landlord to terminate the tenancy (*Burns* agt. *Bryant*, 81 N. Y. R. 453).

TESTAMENTARY CAPACITY.

1. It is not sufficient to justify the rejection of a will, that a testator, in other respects competent, entertained the mistaken idea that one of his daughters was illegitimate, if it was not the effect of insane delusion, but of slight and inadequate evidence acting upon a jealous and suspicious mind. Where the conduct of the proponent has been such as to indicate probable cause for contesting a will, the costs of both parties may be charged upon the estate (*Clapp* agt. *Fullerton*, 84 N. Y. R. 190).

TICKETS.

1. The ticket issued to a passenger for his passage from New York to San Francisco does not preclude the party from showing, by parol testimony, a contract for such transportation. And though two tickets—one from New York to Chagres in one steamer, and one from Panama to San Francisco in another—be issued, it does not show thereby more than one contract of transportation from New York to San Francisco (*Roberts* agt. *Van Buskirk*, 81 N. Y. R. 661).

TITLE.

1. A mortgage of a mill, the water power of which depends partly upon parol license and partly upon grant, will not give the mortgagee title to the former part (*Babcock* agt. *Uller*, *Court of Appeals*, ante, 439).
2. But where the mortgage conveys the

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premises upon which the mill stands, describing them by metes and bounds, but contains no reference to the mill, nor the word "appurtenances," or any equivalent expression, it contains, nevertheless, such right to the water power as the mortgagor possesses, not depending upon mere license, although such right may extend beyond the premises actually described by the mortgage. The instrument must be interpreted as though executed and delivered in view of the premises, and, therefore, to convey the mill, as such, with whatever gave it its value as a mill, and which the grantor had power to convey (*Id.*).

3. Where the owner of land upon a mill stream, *ad medium filum aquae*, conveys the land by metes and bounds, "beginning at a stake on the bank of the river," running thence by courses and distances around the farm, until it comes again "to the U. river," and runs "thence down the bank of the river, as it winds and turns, to the place of beginning," the title to the river and the land covered by it remains in the grantor (*Id.*).

4. Where it is alleged in the complaint that the action is brought to recover for taking away plaintiff's horse, detaining him for a limited time, and injuring him, a judgment following such complaint does not have the effect of changing the property in such horse. If the action had been in the nature of trespass or trover for the horse, a recovery and satisfaction in such case would have changed the property in the horse. The minutes of testimony taken by the justice on the trial before him may be read in evidence, to determine whether the scope of the issue being tried before him was changed by the evidence, for the purpose of determining the subject matter of the litigation (*Thurst* agt. *West*, 31 N. Y. R. 210).

5. A bequest of a comfortable support to the daughter of the testator, for and during the period of her widowhood, and a provision in the will making such bequest a charge upon the real estate devised to his three sons, does not convey a fee by implication (*Van Dyke* agt. *Emmons*, 34 N. Y. R. 186).

6. When a party in possession of land, claiming adversely to all others, sells to a party the hay cut therefrom during such occupancy, the legal title thereto passes to his vendee, as against a party claiming title to said premises, although not in possession. *Replevin in the cepit* can only be

brought where trespass could be maintained; and that will only be for an injury to the land in possession of the plaintiff (*Stockwell* agt. *Phelps*, 34 N. Y. R. 363).

7. An executory contract for the sale of personal property does not pass the title to the same. Where goods are wrongfully taken and converted, in an action to recover damages for the same, the rule of damage is, the highest market price of such goods at the place of taking, between the time of the taking and that of the trial (*Burt* agt. *Dutcher*, 34 N. Y. R. 493).

See LICENSE, 1, 2, 3, 4, 4, 6, 7, 8, 9.

TOWNS.

1. To subscribe for railroad stock, or to purchase stock, and become a member of a corporation, and issue its bonds therefor, is not one of the general powers possessed by towns. Before a town can become bound by persons assuming to act as its officers for that purpose, the authority for such action must have been conferred by the legislature, and accepted by the town. Such power may be conferred upon towns; and when conferred, and accepted by a town, it may be exercised by officers or commissioners, as shall be specified in the act. But acceptance by the town can not be forced. A town can not, by mere legislative enactment, be compelled to subscribe for the stock of a private corporation, or to issue its bonds in payment for such subscription, any more than can an individual. The authority to grant the power, and declare the mode of acceptance, is with the legislature; but the option of acceptance is with the town. Where the power to subscribe for the stock of a railroad company, and issue bonds in payment, is offered to a town, by an act of the legislature, such power, until accepted in the mode specified in the act, has no vitality, and all action in the matter, in the name of the town, is without authority, and void. If the mode of acceptance specified is by the written consent of a majority of the tax payers, a consent in that form is a condition precedent to vitality in the power. The appointment of a commissioner by the town, to execute the act, if the same shall be accepted, is not an acceptance of the power. A town may sue and be sued, in all controversies between it and others, and in all litigations must sue and be sued by its name, except where officers are specially authorized by law to sue in

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their name of office, for its benefit. A town may maintain an action to restrain the negotiation of bonds issued in the name of a town by a person assuming to act as its commissioner, in payment for subscriptions to stock of a railroad company, where the statute under which the bonds purport to be issued declares that "all bonds issued by the commissioners of the several towns shall be binding upon the town," &c., "in the hands of *bona fide* holders and owners," &c., and there is consequently a color of liability against the town. If a statute authorizing a town to take stock in a railroad corporation, and issue its bonds therefor, has not been accepted by the town, nor the conditions precedent requisite to authorize the commissioner of the town to subscribe for stock, and issue bonds, complied with, the commissioner is not the agent of the town, nor authorized to act for it, or in its behalf, in the premises; and his subscription for stock, and issue of bonds, in the name of the town, will be unauthorized acts, and wholly void. And no subsequent statute can legalize such bonds, or make them binding (*The Town of Duaneburgh* agt. *Jenkins*, 46 Barb. 294).

TRESPASS.

1. An act of the lessor, amounting to a mere trespass, and not interfering with the substantial enjoyment of the demised premises by the lessee, is not equivalent to an eviction. It is not necessary that there should be an act of expulsion by physical force, to constitute an eviction; but there must be an actual or constructive exclusion of the tenant from the possession or beneficial use and enjoyment of the whole or some portion of the property demised (*Lounsbury* agt. *Snyder*, 31 N. Y. R. 514).
2. Where the assumption of dominion over property is in hostility to the rights of the true owner, such assumption amounts, in law, to a conversion. Where the defendant received a number of firkins of butter, a part of which he was notified belonged to the plaintiff, but notwithstanding he shipped them all as his own, such act amounted to a conversion for which he is liable. To maintain an action for the wrongful conversion of property, it is enough that the rightful owner has been deprived of it by the unauthorized act of another assuming dominion over it (*Boyce* agt. *Brockway*, 31 N. Y. R. 490).
3. In trespass, all who aid or assist are

principals. Hence, one who directs the imprisonment of another is guilty of the imprisonment. Where a superintendent of police tells the officer who has made an arrest to take the prisoner back and lock him up, in contemplation of law he does the act which the officer does in following the direction. He is not permitted to show that the act was not the consequence of the request, which the law adjudges to be part and parcel of the act itself. He cannot direct a trespass, and after its commission escape upon the ground that the officer violated his duty in obeying the direction (*Green* agt. *Kennedy*, 46 Barb. 16).

4. Where land is not in the actual possession of the owner, but is occupied by tenants or lessees, at the time of the commission of trespasses thereon, the owner can only recover for such trespasses as are injurious to the inheritance (*Weed* agt. *The City of Williamsburgh*, 46 Barb. 601).

TRIAL.

1. In the settlement of issues in a divorce case, an issue whether the party was guilty of adultery with a specified person, at any time before the commencement of the action, should not be allowed. Some limits of time and place must be indicated. But issues actually made in the pleadings, and inserted accordingly, without objection, in the issues as framed for trial, will not be expunged on motion, on the mere ground of indefiniteness as to time and place (*Strong* agt. *Strong*, 1 Abb. N. S. 233).
2. Whether a name in the list of creditors, variant from that of the plaintiffs, was intended to designate them, or whether their names were omitted, and if so, whether the omission was fraudulent; *Held*, in this case properly submitted to the jury (*Soule* agt. *Chase*, 1 Abb. N. S. 43).
3. The expression of an opinion by the sheriff, as to the guilt or innocence of the prisoner, is not sufficient cause of challenge to the array, unless he does some act, or omits some duty, by reason of which some juror called upon to try the case is disqualified (*People* agt. *Ferris*, 1 Abb. N. S. 193).

TRUSTEES.

1. As against the creator of a trust, under a trust deed securing to the grantor the rents, issues and profits of real estate during life, with remainder

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ever, the court will not interfere in behalf of the remainder-men, to give them more than is secured to them by the very terms of the settlement (*Matter of Livingston, Court of Appeals, ante, 20*).

2. Those claiming in remainder under such a trust deed are interested in the management of the trust estate, and may prevent waste, calculated to injure or destroy the estate in remainder; but the creator of the trust is the only person who is interested in the execution of the express trusts therein mentioned (*Id.*).
3. The statute does not authorize a proceeding by petition, at the instance of those entitled in remainder, to remove a trustee of an express trust to receive the rents and profits of lands, and apply them to the use of any person, during the life of such person (*Id.*).
4. The statute authorizing any person interested in the execution of express trusts to apply for the removal of a trustee on petition, was only intended to embrace that class of persons who are immediately interested, and who might be injured by a violation of the trust, or by the insolvency or other incompetency of the trustee (*Id.*).
5. It was erroneous in the court below to entertain a petition for the removal of a trustee, except upon the application of the creator of the trust (*Id.*).
6. Where the evidence tended to show that a deed of trust was obtained by fraud and undue influence, from a person of weak or unsound mind, it was the duty of the court below to dismiss the petition for the removal of the trustee, unless the judge was fully satisfied that the trust deed was the voluntary act of a sane man (*Id.*).
7. Assuming, however, that the grantor was competent to create the trust, and that the deed is valid, the court ought not to remove the trustee against the wishes of the creator of the trust (*Id.*).
8. An order removing a trustee held appealable, and that upon such appeal the court of appeals will examine the affidavits and evidence, and the whole merits of the determination appealed from (*Id.*).
9. A person standing in a fiduciary relation to an heir, or person entitled to property, cannot enter into any treaty for the purchase of that estate, without communicating to him every particle of information that he himself possessed with respect to its value

(*McMahon agt. Allen, Court of Appeals, ante, 813*).

10. A fraudulent use of the statutes for the prevention of frauds, &c., will not be permitted; and a court of equity will interfere against a party intending to make such statutes an instrument of fraud. Where a purchaser under a foreclosure sale, undertakes to purchase for the benefit of the mortgagor, and thus acquires the title at a price greatly below its value, he will be deemed the trustee of the party for whom he has undertaken the purchase, and on tender to him of the purchase money and interest, he will be compelled to convey the property to the party equitably entitled. It is no objection, that the agreement by which he undertook to purchase for the benefit of the owner of the equity of redemption, was not in writing. The law makes him a trustee *ex mala fide* (*Ryan agt. Dox, 84 N. Y. R. 307*).

See RELIGIOUS CORPORATIONS, 1, 2, 3, 4, 5, 6.

TRUSTS.

1. In general, property held in trust for the debtor, and for his benefit, may be reached through the agency of a court of equity, and applied to the satisfaction of his debts; but not property held in trust for him upon a trust, or arising out of a fund proceeding from a third person, designed to secure the debtor personally, a support. But a trust arising out of a fund proceeding from a third party, is not absolutely exempt from equity jurisdiction, but is subject to the same conditions under which other trust property may be enjoyed by a debtor secure from attacks from his creditors. *It seems*, that in such case, only so much of the trust fund would be subject to the demands of creditors, as would remain a surplus after providing for the proper support of the *cestui que trust*. Therefore, in an action seeking to recover such fund by the creditor, &c., the complaint must show by proper averments, the existence of such surplus (*Graff agt. Bennett, 31 N. Y. R. 9*).
2. Where the trusts under a will vested in the executor, are distinguishable from those attached to his office, the court may dismiss him as to the former, and not as to the latter. But if one of several executors is guilty of misconduct in his dealings with the estate, the court will interfere, in a proper case, to regulate his conduct,

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and compel him to place the notes, bonds and other securities in his possession, belonging to the estate, in such custody as to enable his co-executors to obtain access to the same; and may direct the mode in which he shall co-operate with his co-executors in discharging his duties as executor under the will. *It seems*, the surrogate is authorized, under the statutes of this state, upon an accounting by the executor, to administer the same remedy (*Wood* agt. *Brown*, 34 N. Y. R. 337).

UNDERTAKING.

1. In an action upon an undertaking given in an attachment suit, after verdict and judgment in the latter suit, the defendant—the surety in the undertaking—cannot introduce testimony on the trial to show in contradiction of the recitals in the undertaking, that no application had been made for the discharge of an attachment in the action in which the undertaking was entitled, and that no attachment had been issued or granted (*Coleman* agt. *Bean*, *Court of Appeals*, ante, 370).
2. It is not essential to the validity of the undertaking, that the plaintiff should compel its execution, by actually suing out an attachment and making a levy (*Id*).
3. It is competent for the parties to the action to waive, if they choose, the issuing of an attachment and a seizure of property under it, and for the defendant to give, and the plaintiff to accept, in consideration of the waiver, such an undertaking as the defendant would have been required to give in an application to discharge an attachment actually issued and levied (*Id*).
4. The fact that the defendant has put in an undertaking, which recites that an attachment had been issued, and that he was about to apply for its discharge, is conclusive evidence of such waiver. It is enough that the undertaking is binding between the principal parties, under such circumstances, to hold the sureties (*Id*).
5. Where such an undertaking has been procured by the agent of the plaintiff, and the plaintiff having received it upon a valid legal consideration, and being ignorant of any false or fraudulent representations alleged to have been made by his agent in obtaining the undertaking, and in no way responsible for it, such fraud cannot be set up to deprive him of the benefit of the undertaking (*Id*).

6. On an appeal from a judgment entered by the direction of a single justice of the marine court to the justices thereof at general term, security may be given by the appellant, which will operate as a stay of proceedings, according to the provisions of the Code. By the provisions of the act of 1853 (ch. 617, § 5), an appeal may be taken from a judgment entered by a single justice of the marine court to the justices thereof at general term, in the same manner and with the like effect as appeals in the supreme court, &c (*Roberts* agt. *Donnell*, 31 N. Y. R. 446).

7. Where the statute requires an undertaking to be entered into by sureties, in order to give a right of appeal, an instrument containing the requisite stipulations is valid, although it does not express a consideration, and is not under seal. The statute of frauds applies only to common law agreements, where the consideration was the subject of mutual agreement between the parties. It does not apply to instruments created under, and deriving their obligation from, special statutes, without the acceptance or assent of the party for whose ultimate benefit they were given. The Code prescribes no form for the undertaking to be given on appeal from the judgment of a justice of the peace (*Doolittle* agt. *Dinny*, 31 N. Y. R. 340).

USAGE.

1. A local usage in a particular trade is inadmissible to control the rules of law in respect thereto. Authority given to a broker to sell property, does not include authority to receive payment for the same, especially when the principal is known to the vendee. The duty of a broker, in general, is ended when he has found a purchaser, and has brought the parties together. (*Per Wright, J.*) A local usage in New York, allowing brokers to receive payment for grain sold by them, when the seller resides out of the city, is not admissible in evidence for the purpose of establishing authority in the broker to receive such payment (*Higgins* agt. *Moore*, 34 N. Y. R. 417).

USE AND OCCUPATION.

1. In an action for use and occupation, it is not necessary to prove the defendant to have been in manual occupation of the premises during the time for which recovery is sought. If the power to occupy and enjoy is given by the landlord to the tenant, so far as the

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landlord is concerned, he has performed on his part, and the action is maintainable. Where defendants leased a barn for the term of three years, and took possession, and actually occupied the same for one year, and continued to keep the key, but did not actually occupy: *Held*, he was liable in an action for use an occupation (*Hall* agt. *Western Transportation Co.* 84 N. Y. R. 284).

USURY.

1. Where more than legal interest for the forbearance of money is intentionally taken, whether the party acts in ignorance of the law or not, it is conclusive evidence of a corrupt agreement within the statute, and the contract is void (*Bank of Sakna* agt. *Alvord*, 81 N. Y. R. 473).
2. There being no usurious agreement, the question whether there was a usurious intent is immaterial (*Smith* agt. *Patten*, 81 N. Y. R. 66).
3. The credit of one person may be rendered available to another by gift, sale or exchange, which is virtually a sale; and if not intended as a cover for usury, it may be the subject of a consideration to be agreed upon between the parties, the same as in the disposition of other commodities. The principals cannot enjoy the benefits of a bargain made by their agent, without adopting the instrumentalities by which he consummated it (*Elwell* agt. *Chamberlin*, 81 N. Y. R. 611).
4. The mere fact that a promissory note payable in the city of New York, is made and discounted in the country, and a portion or the whole of the proceeds paid to the borrower in a draft upon the city, at the usual price or charge for city drafts, does not render such note usurious. Perhaps the note might be held to be usurious if both the place of payment thereof and the purchase of the draft were made the condition of the loan. (*Per Johnson, J.*) But where nothing of that kind is shown, and for aught that appears in the finding of facts, the borrower desired a draft on the city for his own convenience, if the fact was otherwise, it is for the defendant alleging the usury, to prove it (*The Union Bank of Rochester* agt. *Gregory*, 46 Barb. 98).
5. Where a mortgage on lands in Wisconsin, and the bond accompanying the same, executed in New York, were alleged to be usurious: *held*, that a party asserting the validity of the se-

curities, was bound to prove what the statutes of Wisconsin respecting usury were, at the time the securities were executed, or abide the presumption that such statutes were in accordance with our own. Had such bond and mortgage been executed in Wisconsin, perhaps the presumption would have been that they were valid. But, being for \$1,000, upon a loan of only \$900: *Held*, that they were void by the common law; and that having been given in New York, it was for a party asserting their validity, to show that the statutes of Wisconsin authorized the lender to take a bond and mortgage for \$1,000, upon a loan of only \$900. If a bond and mortgage are usurious and void, a subsequent bond and mortgage, for which the former securities constitute the greater portion of the consideration, will also be usurious and void (*McCraney* agt. *Alden*, 46 Barb. 272).

6. Usurious interest cannot be recovered back, except under the statute. If the action to recover it back is not brought within the time prescribed by the statute, viz.: one year from the time of payment, it cannot be sustained (*Palen* agt. *Johnson*, 46 Barb. 22).

VENDOR AND PURCHASER.

1. A purchaser, by the purchase and payment of the price, of land, acquires the entire equitable title, and the vendor only holds the naked legal title, without any real interest, in trust for him, and cannot convey it to another without his consent. And if such consent is never in fact given, the title will not pass from the vendor by his conveyance to another (*Ponda* agt. *Sage*, 46 Barb. 109).
2. Upon a sale of barley by M. to D., for cash on delivery at the storehouse of G., it was agreed the money should be left by D. with G. to pay the price. The purchaser did not attend in person to the receiving and measuring of the grain, but had a clerk or agent there for that purpose. *Held*, that a demand of the money, of such clerk or agent, was sufficient; and that it was not necessary for the vendor to go in search of the purchaser, himself, to make the demand of him. *Held*, also, that the clear intent of the contract was that the money should be at the place of delivery; and if it was not there, the purchaser was in default, unless the vendor waived that condition. That whether he waived it or not, depended on his intent at the time of the delivery; and that it was a ques-

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tion of fact for the jury. *Held, further*, that the fact that the grain was, as the same was delivered from day to day at the storehouse of G., put into bins in which other barley of D. was being put at the same time, was not such an admixture of the grain as to make the owners thereof tenants in common; no such tenancy being contemplated, and the admixture being for no such purpose. And that M., notwithstanding the admixture of the barley delivered by him with barley delivered by others, did not lose his ownership, but remained owner of the quantity delivered as though it had not been so mixed. That he had the right, as against D., and consequently as against G., his bailee, to take that amount from the common bulk; and that hence G., in denying that right, and refusing to permit him to have his own, was guilty of converting it, so as to entitle M. to his action (*Morgan agt. Gregg*, 46 Barb. 183).

3. The rules of law deduced from the maxim *caveat emptor* have reference generally, and more particularly, to the condition of personal property, sold by one party to another. The general rule is that the purchaser is bound to examine and ascertain the defects in the thing sold, and unless there is some misrepresentation or artifice to disguise it, or some warranty as to its qualities or character, the vendee is bound by the contract, notwithstanding there may be intrinsic defects and vices in it, known to the vendor and unknown to the vendee, materially affecting its value. The maxim of *caveat emptor* has no application to cases of actual successful fraud practiced by the vendor upon the vendee. The question whether the vendee was actually deceived by the representations or acts of the vendor is always open. If he was not deceived by the representations of the vendor, though they were false, then he has no cause of action. On a sale of certain leases, or leasehold estate, by the defendant to the plaintiffs, the former represented and stated that the property rented for \$4,000 yearly, and a written statement was produced by the defendant of the rents to be received from the property, footing at about that amount. This statement contained a list of the leases, and the amount of rents reserved. Among the leases therein specified was a lease to the Buffalo and Lake Huron Railway Company, for ten years, at a yearly rent of \$600. Nearly seven years and ten months of the term were unexpired. In fact, the rent to accrue upon that lease, thereafter, was only

\$111.11, annually, the sum of \$5,000 having been already paid upon such lease, and indorsed thereon, according to the terms of payment specified therein. *Held*, that notwithstanding the lease, with the indorsements, showed that \$5,000 of the rent was payable at two specified periods prior to the sale of the lease to the plaintiffs, and that the same had been paid when due, leaving only a yearly rent of \$111.11 to be paid in future; and assuming that under ordinary circumstances it would have been the duty of the plaintiffs to examine the lease assigned, to see whether it contained any special or unusual provisions, yet that the fraudulent acts and representations of the defendant were well calculated to satisfy them, and to cause them to omit such examination; and that the plaintiffs having been actually deceived and defrauded by means of such representations, an action lay for damages. (*GROVER, P. J. dissented.*) *Held, also*, that the right of the plaintiffs to recover did not depend upon their care and prudence in examining the lease, in respect to the rents reserved and the payments that had been already made. That they had a right to rely upon the representations made by the defendant that the rents reserved amounted to \$4,000 annually, and that to make up this sum the annual rent on the railroad lease was \$600. That, in other words, the omission of the plaintiffs to examine the lease and the receipts upon it was not such negligence as would deprive them of a right of recovery. That the fact being established by the undisputed evidence, the question whether the omission of the plaintiffs to examine the railway lease involved such a want of care and prudence as to defeat their right to recover was a question of law to be decided by the court, and should not have been submitted to the jury (*Clark agt. Rankin*, 46 Barb. 570).

4. A stipulation in a deed of real property, or in another instrument between the vendor and purchaser, not merged in the deed, that the vendor shall retain possession for a time, and then shall deliver possession to the purchaser, does not create the relation of landlord and tenant between them during such period. The premises are meanwhile at the risk of the purchaser; and the vendor is not liable to him, upon such contract, for a loss by fire before the delivery of possession. Even were it otherwise, the purchaser's acceptance of the deed, after the fire, with knowledge of the loss, would extinguish any claim to indem-

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nity (*Mott* agt. *Coddington*, 1 Abb. N. S. 290).

VESSELS.

1. Where necessaries are purchased for the use of a vessel, by its master, and where the registry contains the names of the owners, with such person as master, such owners are *prima facie* liable for supplies, in the absence of any proof qualifying such master's authority (*Kenzel* agt. *Kirk*, *Court of Appeals*, ante, 269).
2. In such case it rests with the defendants to establish a defense (*Id.*).
3. The proof that such vessel was "run on shares," is not of itself sufficient to discharge the owners from responsibility (*Id.*).
4. The real question is, who, by the charter party, has sole possession, command and navigation of the ship? This is always a question of fact, depending on the peculiar circumstances of each case. In many cases, "running on shares" is a method of determining the amount of the master's compensation as such (*Id.*).
5. The numerous decisions reported from the courts of the eastern states on this subject are based on the principle that the general owners are not liable, because they have the exclusive possession, command and navigation of the ship, not to one as agent, but for the time as owner. In such lettings, the doctrine of agency has no application (*Id.*).
6. The hirer, then, in all contracts for supplies, acts for himself, and upon his own responsibility and credit (*Id.*).
7. In all such cases, the share of freights paid to the owners by the hirer is to be regarded as their charter money for the use of the vessel (*Id.*).
8. But where the general owners say to the captain "we will give you a gross sum per month," or "we will give you one half her gross earnings to sail her for us as captain, and you shall pay half of her disbursements, and find all her supplies," the owners are responsible for supplies to third persons ignorant of the arrangement, as in ordinary cases of masters purchasing supplies for vessels they command (*Id.*).
9. The act of congress, passed August 30, 1852, entitled "An act to amend an act entitled 'An act to provide for the better security of the lives of passengers on board of vessels propelled in

whole or in part by steam,' and for other purposes," was intended to provide additional guards and securities for passengers who might embark upon steam vessels, without exempting the owners from the liabilities imposed by the legal relationship which existed between them and passengers. The regulations contained in the act did not supersede, and were not intended to supersede, the redress which the common law extended to aggrieved parties for injuries received. Accordingly, a certificate made by an officer of the government, showing that the boilers of a steamboat have been properly inspected as directed by the act of congress, and showing a compliance with the provisions of the act by the owners, will not exonerate such owners from liability in an action brought by a passenger to recover damages for a personal injury occasioned by the explosion of a boiler. In such an action, the plaintiff is entitled to recover damages for his bodily pain and suffering (*Swarthout* agt. *The New Jersey Steamboat Company*, 46 Barb. 222).

10. The justices of the superior court of the city of New York have power to issue attachments against vessels, under the act of 1862. On an application for an attachment under that act, a specification of the debt need not be filed, unless the vessel has left the port where the debt was contracted (*Delaney* agt. *Brell*, 1 Abb. N. S. 421).

WAIVER.

1. No implied waiver can be intended of an irregularity or omission of which the parties had no notice, or of which they cannot be charged with notice (*The People ex rel. The Commissioners of Highways of the Town of Cohocton* agt. *Connor*, 46 Barb. 383).
2. The voluntary act of the obligors in giving a bond, under an order of court which affords the party his election to give it or not, is a waiver of any objection to the authority of the judge making the order to require such a bond (*Ford* agt. *Townsend*, 1 Abb. N. S. 159).

See ADMIRALTY.

WARRANTY.

1. A warranty of fitness of an article for a specific purpose, cannot be implied from a knowledge on the part of the seller that the article is intended for such a purpose. Where the vendor of

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an article is not the manufacturer thereof, the above rule of the civil law will not apply. (*Per POTTER, J.*) (*Bartlett* agt. *Hoppock*, 34 N. Y. R. 118).

WAY—RIGHT OF.

1. A right of way over a man's land affects his title, and a justice of the peace has no jurisdiction to try such a right. The owner may interpose a plea of title when sued by the commissioners to recover the penalty given by 1 R. S. (p. 321, § 102), for obstructing an alleged highway over his premises. The case of *Parker* agt. *Van Houten* (7 Wend. 145), questioned. (*Per MORGAN, J.*) But such an answer is a nullity in a justice's court, unless accompanied by an undertaking, as required by section 58 of the Code. The defendant having gone to trial in a justice's court, upon an answer containing a general denial, of the complaint, and, also, a second answer denying that the *locus in quo* was a public highway—after proof, by the commissioner, that the highway in question had been opened and traveled as such for a year and over—offered evidence tending to prove that the *locus in quo* was not included in the boundaries as contained in the order filed in the clerk's office laying out the highway: *Held*, that such evidence raised a question of title, and was properly excluded by the justice. Evidence of *user* by the public of the *locus in quo* as a public highway, although for a period less than twenty years, is *prima facie* sufficient to support the action, all other essential facts being proved. (*Per SMITH, J.*) The defendant, not being in the actual occupation of the *locus in quo*, cannot overcome such evidence in a justice's court by production of his title deeds, or by proof that he is in possession of the adjacent premises. (*Per MORGAN, J.*) (*Little* agt. *Denn*, 34 N. Y. R. 452.)

WILLS.

1. Testamentary capacity is mainly a question of fact to be determined by the testimony of witnesses examined before the surrogate, when the will is propounded for record, &c. To establish undue influence over the testator at the time of executing his will, it must be made to appear that the importunity or influence was such as to deprive the testator, at the time, of the free exercise of his will. Influence arising from gratitude, affection
2. Where a lot is specifically devised, and afterwards sold by the testator to a third party, the sale operates *quoad hoc*, as a revocation of the gift, and the devisee acquires no interest in a mortgage given to secure the whole or any portion of the purchase money. Otherwise, it seems when the testamentary gift is of the proceeds of particular property, afterwards sold by the donor, if the avails are separable, in whole or in part, from the general bulk of the estate. When the testator makes a devise, in general terms, of all his real estate, it is operative only in respect to such real estate as he has at the time of his death. When two interests in the same subject matter are given to successive donees, the words, if they admit of it, should be so construed as to avoid incongruity, and to secure to each the interest intended by the testator (*McNaughton* agt. *McNaughton*, 34 N. Y. R. 201).
3. In construing wills, the courts take notice of the natural relations in which the testator stands to the objects of his bounty, and of the mode in which the law would dispose of the estate in case he had died without indicating his purpose; and thus they will interpret the will by these considerations and legal dispositions, unless such interpretation should be overcome by extrinsic facts clearly existing, and obvious to the mind of the testator, or by the explicit and unmistakable terms of the will. When the word "heirs" is used in a will, and there are no other words to control the presumption, the legal inference is, that it is "*nomen collectivum*;" that it designates the persons whom the law appoints to succeed to the inheritance, in cases of intestacy; and that legatees thus designated, take by representation, and not in their own right. Although a different intention may be inferred, and a different rule of distribution may be applied, when the word "children" is used, instead of heirs, and in the absence of anything to control the division, it may in such cases be *per capita*, yet even then, if the intention can be collected from the will, that the children of a deceased party are to take as a class, they will be adjudged to take *per stirpes*. In all the cases in which it is held that where a gift is made to one person standing in a certain relation to the testator, and to the children or heirs of another person standing in the same relation to him, the beneficiaries take *per capita*, it will be found that the words "to be

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equally divided," or "in equal shares," or words of similar import, have also been employed in the will, and have been deemed by the courts of controlling significance in ascertaining and determining the intent of the testator. So far is it from being the established rule that where a residuary bequest is made to A. and the heirs of B., without further description, limitation or direction, the legatees all take *per capita*, it may be affirmed that even in the case where the words "equally to be divided," are used, the courts will avail themselves of any other language in a will which may indicate a different intention on the part of the testator, and one more consonant with natural impulses, to abandon the rule of distribution *per capita*; or, as the books express it, upon "a faint glimpse of a contrary intent." (*Per* BACON, P. J.) (*Clark* agt. *Lynch*, 46 Barb. 68.)

5. A testator, by the seventh clause of his will, devised as follows: "I give, devise and bequeath the balance of my property, real and personal, to my brother, James Lynch, and to the male heirs of my brother, John Lynch, deceased, except that Dennis Lynch, one of said heirs, is to receive no part whatever, but the same is to be divided among the other male heirs of said John Lynch, deceased." *Held*, that by the true construction of this clause, James Lynch was entitled to one-half of the residuary bequest, and the male heirs of John Lynch, excluding Dennis, were entitled to the other half; and that the distribution was to be made *per stirpes*, and not *per capita* (*Clark* agt. *Lynch*, 46 Barb. 68).

6. The introductory part of a will contained these words: "As for my worldly estate, after my decease, be disposed of in manner following." By the third clause, the testator gave and bequeathed to his son F., without words of perpetuity, "thirty acres of land on which he now lives, my young black mare, \$200 in six months after my decease, and one-sixth part of the personal property not otherwise disposed of." By the fourth clause, he gave and bequeathed to his son J. the home farm, and a share of the personal estate, in precisely the same language with the bequest to F., but subject to a charge thereon. There was no residuary clause in regard to the real estate, as there was in respect to the personal: *Held*, that looking at the entire will, it was clear the testator intended to give his son F. an estate in fee simple in the twenty-nine acres, although there were no words of per-

petuity in the devise: *Held*, also, that although J. took a fee in the home farm, by reason of the charge annexed as a proviso to the gift, this did not affect the devise to F., by way of operating to enlarge the estate he would take otherwise. But that that circumstance might properly be referred to, as evincing an intention on the part of the testator to make a final and complete disposition, by his will, of his entire property, leaving no residue or remainder. A will contained the following clause: "After the death of my said wife L., it is my will and my order, that all my real and personal estate and property of every kind and nature, and description, shall be sold by my executors, and that the proceeds thereof be paid over to the following named charitable societies, in four equal portions." Then followed provisions giving to his executors, in trust for each of said societies, one-fourth part of the whole of such proceeds, *Held*, that the bequests to the several societies mentioned, were not of the land itself, as land, but merely of the proceeds of the land after sale, upon the death of the testator's widow. And that upon the well established rule of equitable conversion, those bequests were gifts of money, instead of land (*Harris* agt. *Slaght*, 46 Barb. 470).

7. A devise and bequest of all the rest, residue and remainder of the testator's estate, both real and personal, to his two children, "subject, nevertheless, to the dower and thirds" of his wife, gives the widow no interest in the personal property (*O'Hara* agt. *Dever*, 46 Barb. 609).

8. The propositions concurred in and adopted by a majority of the judges in *DeLafield* agt. *Parish* (25 N. Y. R. 9), furnish a safe and reliable guide in cases of a similar character; and in testing the question of the capacity of a testator to make a testamentary disposition of his estate, it is not essential for courts to extend their inquiry beyond the rules stated in that case. (*Per* MILLER, J.) The rule established in *Stewart* agt. *Lispenard* (26 Wend. 255), must be considered as qualified by the propositions adopted by a majority of the court in *DeLafield* agt. *Parish* (25 N. Y. R. 97). Hence the true question to be determined, in similar cases, is whether the testator was *compos mentis*, at the time of the execution of the will in question, as those terms are used in their fixed legal meaning. The legal presumption is, that every man is *compos mentis*; and most usually, the burden of

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proof that he is *non compos mentis*, rests with the party who alleges that condition of mind (*Ean* agt. *Snyder*, 46 Barb. 230).

9. The statute of 1860, relating to wills (*Laws of 1860, ch. 360*), which provides that "no person having a husband, wife, child or parents, shall by his or her last will and testament, devise or bequeath to any benevolent, charitable, literary, scientific, religious or missionary society, association or corporation, in trust or otherwise, more than one-half part of his or her estate, after the payment of his or her debts," and declares that "such devise or bequest shall be valid to the extent of one-half and no more," had a far broader and more general design than the protection and assistance of certain specified relatives of a testator, and looks rather to the establishment of a general public policy, than to the advancement of private personal interests. Accordingly held, that any heir-at-law of a testator, entitled to share in the estate, in case of the failure of the will, or the establishment of its invalidity, in whole or in part, on the ground that some of its provisions are in violation of the above statute, may come into court for a construction of, and an adjudication upon such will. Where a testator dies leaving a widow, but no child or parents, and the widow has no interest in raising the objection that some of the devises of the will are void under the act of 1860, a sister of the testator, who is one of his heirs-at-law, and interested in the remainder, after the determination of a life estate, may contest the validity of the will on that ground, and maintain an action to have the validity of the disputed provisions adjudicated upon and determined (*Harris* agt. *Slaght*, 46 Barb. 470).

10. An officer in the army of the United States, in May, 1864, after it had commenced to move on Richmond, wrote and sent a letter to his sister, saying, if he was killed or did not return, he wanted her to have his property. He was killed in August, 1864: Held, that this portion of the letter was a valid will by a soldier, and should be admitted to probate as such. Whether a testamentary declaration made by a soldier in actual military service, is valid as a will, although not made in sickness, or peril of immediate death, *quere?* (*Botsford* agt. *Krake*, 1 Abb. N. S. 112.)

WINE PLANTS.

1. Wine plants, growing upon a farm, are, as between landlord and tenant, personal property, and the latter has a right to remove them. If the tenant executes a mortgage upon such plants, the same is valid, as between the parties to it, and will enable the mortgagee, by foreclosure and sale, to acquire the mortgagor's right of removal (*Wintermute* agt. *Light*, 46 Barb. 278).

WITNESS.

1. In an action by heirs at law of an intestate son, claiming a specific performance of an oral agreement for the conveyance of land, against the devisees of the father, one of the defendants, a devisee, cannot be a witness on his own behalf to prove a conversation between the father and son, and in which the witness took part, respecting the agreement by the father to give the son a deed of the property, on the performance of certain conditions (*Lobdell* agt. *Lobdell*, ante, 1).
2. And it is not material whether the witness took part in the conversation or not. The broad objection is that he proposed by his evidence of the confessions or declarations of the deceased father of the plaintiffs (the son) to defeat their title as the heirs at law, and to establish his own title, he being a defendant. If the case does not come literally within the words of the statute (*Code*, § 399), "any transaction or communication had personally by such party with the deceased" father of the plaintiffs, it is within the intention of the statute (*Id*).
3. Where non-professional witnesses, who did not attest the execution of a will, are examined as to matters within their own observation, bearing upon the competency of the testator, they may characterize as, in their opinion, rational or irrational, the acts and declarations to which they testify; but the examination must be limited to their conclusions from the specific facts they disclose, and they cannot be permitted to express their opinions on the general question whether the mind of the testator was sound or unsound. An exception to this rule is admitted in the case of attesting witnesses whose testimony relates to the condition of the testator at the very time of executing the will, and who may well retain a recollection of the general result of their observa-

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tions, after the particular circumstances have been effaced by lapse of time (*Clapp* agt. *Fullerton*, 34 N. Y. R. 190).

4. Where the defense of usury is made by the drawers of a draft, on the ground that the same was an accommodation draft, in the hands of the acceptors, and was discounted by their agents to the plaintiff, at a greater rate of interest than seven per cent per annum, the proof of such rate of discount cannot be made by producing an extract from the books of such agents, reciting facts from which such usurious discount can be inferred. Such proof must be made by the oral testimony of living witnesses, or by the other recognized modes of establishing facts (*Churchman* agt. *Lewis*, 34 N. Y. R. 444).
5. Under section 399 of the amended Code of 1859, enacting that "an assignor shall not be admitted to be examined in behalf of any person deriving title through or for him, against an assignee or an executor or administrator, unless the other party to such contract or thing in action, whom the plaintiff or defendant represents, is living, and his testimony can be procured," &c.: *Held*, that an assignor was not excluded from testifying against a "legatee," when suit was brought to recover from such legatee the amount of a judgment against the testator. A legatee is not within the meaning of the words "an assignee or executor or administrator" (*Hight* agt. *Sackett*, 34 N. Y. R. 443).
6. Under the provisions of the Code of Procedure, which authorize the examination of parties to actions before the trial, the testimony of a party may be taken before issue joined. The object of allowing a party to be examined at the instance of his adversary, before trial, was not merely for convenience, but to enable a party to obtain and secure evidence in support of his cause of action or defense (*McVickar* agt. *Ketchum*, 1 Abb. N. S. 452).
7. In an action against an executor, the plaintiff cannot be permitted to testify, as a witness in his own behalf, to what passed between him and the deceased, in her lifetime; nor to testify that certain conversations did not occur between him and the deceased. It matters not whether the object of the testimony is to prove the affirmative or a negative. The objection that the alteration of the law admitting parties as witnesses has rendered the books of a party unnecessary as evi-

dence, even if it had that effect in other cases, does not apply where the other party is dead; because in such a case he cannot testify (*Clarke* agt. *Smith*, 46 Barb. 30).

8. The law does not presume that a person of mature age, whose general character has been notoriously bad up to within a period of five years, has reformed, so as to have acquired an unimpeachable reputation since that time. Reformation may be shown in answer to the attack, but the law will not presume it in advance. On the trial of a cause, a party offered to prove the general character of a witness when he resided in the town of A., by a person who knew him there some five years before the trial. The evidence was objected to on the ground that the witness sought to be impeached had had a fixed residence in another place for the last three or four years, and that the evidence should be directed to his present character, at the place of his present residence, about which the impeaching witness did not pretend to know anything. *Held*, that a decision excluding the evidence was clearly erroneous. A party cannot prove, by a witness himself, and by other parol testimony, that the witness has been convicted of a felony and sent to the state prison. The record is the best evidence in such a case. Parol evidence to prove that a witness has been an inmate of a state prison is not admissible; that not being evidence of general character, but of some particular fact, which can never be resorted to by a party attacking the credibility of a witness (*Rathbun* agt. *Ross*, 46 Barb. 127).
8. The Code of Procedure has not changed the common law rule that prohibits a wife from testifying, after the decease of her husband, to declarations made by him to her when no other person was present. Hence, a wife suing for dower in the land of her deceased husband cannot be allowed to testify to what her husband said to her, in his lifetime, while they were alone, tending to show that a deed executed by him, under which the defendant claimed, was not delivered to the grantee until after he, the grantor, was married to the plaintiff. In such an action, it is competent for the defendant to prove the declarations of the grantor, made after his marriage to the plaintiff, to the effect that such deed was delivered before he married the plaintiff (*Keator* agt. *Dimmick*, 46 Barb. 158).
9. In an action by a husband, to recover

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damages for alleged criminal conversation between the defendant and the plaintiff's wife, where no divorce has been obtained, the wife is incompetent to testify as a witness to any fact in the case. Hence, she is not a competent witness for the plaintiff, to prove the criminal intercourse of the defendant with her, alleged in the complaint. The Code of Procedure does

not apply to such a case, for the reason that the wife is not a party to the action. There is no case that holds that the husband may call his wife as a witness to prove any *secret fact*, not known to any other person, in an action brought by him for his own benefit, to which she is not a party. (*Per BALLOM, J.*) (*Carpenter agt. White, 46 Barb. 291*).

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COURT OF APPEALS.

DECISIONS RENDERED DECEMBER, 1866.

Judgments affirmed, with costs.

Louis A. Middlebrook, respondent agt. The Merchants' Bank in the city of New York, appellant. (41 *Barb.* 481 ; 28 *How.* 474 ; 18 *Abb.* 109 ; 24 *How.* 267.)

William M. Denman, administrator, &c., appellant agt. Isaac M. Marsh, sheriff, &c., respondent.

Peter Rodes, respondent agt. Frederick Bronson, executor, &c., appellant.

Samuel Robinson, plaintiff in error agt. The People, &c., defendants in error.

The People, &c., appellants agt. James D. Ames, sheriff, &c., respondent.

Lucy McIntyre, executrix, &c., appellant agt. William H. Warren, administrator, &c., respondent.

George Parish, appellant agt. Patrick Golden, respondent.

Ira Page and another, respondents agt. Daniel Morrell, et al., appellants.

Chester M. Rork, receiver, &c., respondent agt. William N. Brockway, appellant.

Stephen Van Rensselaer, respondent agt. Hiram Secor, appl't (32 *Barb.* 469).

Same, respondent agt. Arza Bouton, appellant.

Same, respondent agt. John Jose Sand, appellant.

Same, respondent agt. Peter C. Sand, appellant.

Same, respondent agt. Joseph A. Haight, appellant.

Same, respondent agt. Harvey Lemon, Horace Lemon and Mary Lemon, appl'ts.

William P. Van Rensselaer, respondent agt. Lewis Sliter, appellant.

Same agt. Benjamin G. Dennison, appl't ; Same agt. Cornelius Dubois, appl't.

Same agt. William Witbeck, appl't ; Same agt. Andrew W. Berringer, appl't.

Same agt. William Berringer, appl't ; Same agt. John Kelly, appl't.

The Market Bank, respondent agt. Richard Hartshorn, appellant.

Francis Wiegand, survivor, &c., respondent agt. Max Sichel and another, appl'ts.

Charles F. Wells and another, appellants agt. Francis Pierce, respondent.

G. Fred. Reed, appellant agt. The Board of Education, &c., respondent.

The Mutual Benefit Insurance Co., appellants agt. The Board of Supervisors of the City and County of New York, respondents. (23 *Barb.* 312 ; 2 *Abb. N. S.* 233.)

Same agt. Same.

The People ex rel. The Commissioners for the erection of a Public Market in the City of New York, respondents agt. The Common Council of the City of New York, appellants. (45 *Barb.* 473 ; 30 *How.* 327.)

In the matter of the Receivership of the Columbian Insurance Company.

Esop Kinne, appl't agt. The City of Syracuse, resp't (30 *Barb.* 349).

William H. Kenzel, resp't agt. Edwin R. Kirk et al., appl'ts. (37 *Barb.* 113 ; 22 *How.* 184 ; 32 *How.* 269.)

Robert Coleman respondent agt. Aaron H. Bean, appellant.

George A. Simonds, resp't agt. George Law, appellant.

Jesse Sammis, appellant agt. Hugh McLaughlin, respondent.

Isabella Draper, respondent agt. Joseph Stouvenil, appellant.

Cornelius Bentley, respondent agt. George W. Van Derheyden, appellant.

Decisions Court Appeals.

The Merchants' Bank of New Haven agt. George Bliss and another, respondents (22 How. 865).

Louis Guillandsan, appellant agt. James Howell and another, respondents.

Hamilton Murray, respondent agt. Abram M. Binninger and another, appellants.

Henry Rorback, respondent agt. Almus Stebbins, appellant.

Frederick S. Cozzens, respondent agt. Alvin Higgins, appellant.

David Ogden, respondent agt. The New York Mutual Insurance Company.

Thomas Kelly, respondent agt. David Tilton, appellant.

Werden Hesperdt, receiver, &c., respondent agt. Stephen Williams et al., appl'ts.

Judgment reversed and new trial ordered, costs to abide the event.

John Schultz and another, appellants agt. William Schultz et al., respondents.

Philip S. Staats et al., executors, &c., appellants agt. The Hudson River Railroad Company, respondents. (39 Barb. 289 ; 23 How. 463.)

Daniel Pixley, appellant agt. Ralph Clark et al., resp'ts (32 Barb. 268).

James Morgan et al., respondents agt. Edward King et al., appl'ts (30 Barb. 9).

The Buffalo City Bank, appellants agt. Hiram E. Howard, et al., resp'ts.

Mary Hoag et al., appellants agt. Cyrus Hoag et al., respondents.

Ellis K. Powers, respondent agt. John Price, appellant.

Judgment of supreme court reversed, and judgment or decree of the surrogate affirmed, with costs.

David L. Gardner, appl't agt. Julia G. Tyler, resp't. (25 How. 215 ; 16 Abb. 17.)

Judgment affirmed, with costs of all parties to be paid out of the estate of George Lovett, deceased.

Robert Lovett, executor, &c., respondent agt. Mary Kingsland et al., respondents, Augusta Gillender and Eccles Gillender, executor, &c., appl'ts (44 Barb. 560).

Order appealed from reversed with costs, and order granted restoring Ella Hall to the possession of the mortgaged premises.

William Chamberlain, executor, &c., respondent agt. Young Chotes et al., appl'ts (42 Barb. 481).

Order granting new trial reversed, and judgment of special term affirmed with costs.

The People ex rel. John McConvill, and John McConvill, respondents agt. Isaac Hills, appellant (46 Barb. 340).

Order granting a new trial affirmed, and judgment absolute for defendant, with costs.

Elijah H. Kimball, executor, &c., appl't agt. Richard B. Connolly, resp't.

David Owen and another, appl'ts agt. The Hudson R. R. Co., resp'ts.

Order of general term reversed, and order of special term affirmed, with costs.

Joseph H. Williams, appellant agt. James Herron, respondent.

The People ex rel. Peter Cunningham et al., respondents agt. Isaac Roper et al., assessors, &c., appellants.

Order granting new trial reversed, and judgment on verdict affirmed, with costs.

John E. Tallman, appl't agt. The Atlantic Fire and Marine Insurance Company, respondents (29 How. 71).

Judgment in each of the four following cases affirmed with costs—and proceedings in last entitled cause affirmed, with costs.

The Board of Excise in and for the Metropolitan District, respondent agt. John Baine, appellant.

Decisions Court Appeals.

The Same agt. John F. Currier, appellant.

John Baine, appellant agt. Jackson S. Schultz et al., respondents.

William Burke, appellant agt. The Same.

The People ex rel. Ketchum, appellant agt. James H. Cornwell, respondent.

Order granting new trial reversed, and judgment on report of referee affirmed, with costs.

Dennis McMahon, assignee, &c., appellant agt. Thomas E. Allen, respondent.
(34 Barb. 56; 22 How. 193; 18 Abb. 292; 32 How. 813.)

Judgment affirmed, with the modifications as contained in the opinion of Judge LEONARD. Judgment to be settled by Judge HUNT. No costs on this appeal to either party.

Timothy Caster and an'r, respondents agt. Oliver M. Shipman and an'r, appl'ts.

Judgment affirmed with costs to the plaintiff, with a modification striking out from the judgment the words "that the surplus moneys, if any there be, arising from such sales, belongs one-half to Egbert Bement, and the other half to the said Hyde and Everitt," and insert in lieu thereof "that said surplus moneys, if any there be, be brought into the supreme court, to abide its further order." And that no costs on the appeal be allowed to either of the defendants as against the others.

Joseph Smart, respondent agt. Egbert Bement and wife, et al., appellants.

Appeal dismissed, with costs.

Harriet E. Butler, administratrix, &c., respondent agt. William Lee and another, appellants (32 Barb. 75).

Judgment affirmed with costs, and ten per cent damages

George H. Foster, receiver, &c., of Albert Priest, respondent agt. Rodman M. Price, appellant.

Joseph R. Sears, respondent agt. Joseph Conner, appellant.

Catharine Bissell, respondent agt. Hiram Studley, appellant.

Ethan R. Pratt, respondent agt. Demas Strong, appellant.

The People, &c., respondent agt. John Kolb and another, appellants.

John D. Matterson, respondent agt. The New York Central R. R. Co., appellants.

Thomas L. Boutellier, respondent agt. Samuel A. Warren, appellant.

Re-argument ordered

Hugh McCrossen, respondent agt. Abram Thorn, appellant.

The Irving Bank in N. Y., respondent agt. James Wetherald and another, appellants (34 Barb. 353).

The New York Life Insurance and Trust Co., app't agt. Isaac Covert et al., resp'ts.

Thomas Beals, executor, &c., appellant agt. The Home Insurance Company, respondent (36 Barb. 614).

Sarah L. Cook, &c., respondent agt. Samuel M. Meeker and others, appellants (42 Barb. 533).

Thomas Clark, respondent, agt. Eighth Avenue R. R. Co., appl'ts (32 Barb. 657).

James H. Seguire, appellant agt. Henry S. Seguire and others, respondents.

Judgment affirmed with costs, and five per cent damages.

Zenas S. Crane, respondent agt. Roderick Price, impleaded, &c., appellant.

Order appealed from affirmed, with costs.

The People ex rel. Hinds, resp'ts agt. William C. Davison, supervisor, &c., appl't.

The People ex rel. respondents agt. Peter H. Mitchell and others, appellants.

 Decisions Court Appeals.

Judgment reversed, and judgment on report of referee affirmed, with costs.

Nathan Marco and another, appellants agt. The London and Liverpool Life and Fire Insurance Company, respondent.

Judgment appealed from affirmed, with a modification that the judgment on the report of the referee be affirmed with costs, and costs of this appeal to be paid by the appellant Van Vranken.

David D. Campfiell, respondent agt. William Van Vranken et al., appellants.

Order granting new trial affirmed, with costs, and judgment absolute for plaintiff for the amount of plaintiff's damages as ascertained at the trial, with interest thereon from that day, with costs.

James G. Shepherd, resp't agt. The Buffalo and N. Y. and Erie R. R. Co., appl'ts.

 DECISIONS RENDERED APRIL, 1867.

Judgments affirmed, with costs.

The People &c., respondents agt. Benjamin Brandreth et al., appellants.

In re Petition of Clark, appellant agt. Chillian Ford, administrator, &c., respondent.

Samuel Colt, executor, &c., respondents agt. The Lewistown Railroad Company, appellant.

William B. Renwick and another agt. The New York Central Railroad Company, appellants.

Myles Sheridan, administrator, &c., respondents agt. The Brooklyn City and Newtown Railroad Company, appellants.

John A. Merritt, respondent agt. George A. Bartolick, administrator, &c.

Stephen Brush, executor, &c., respondents agt. William Lee and another, appl'ts.

The Artisans' Bank, respondent agt. Charles E. Backus, appl't. (31 How. 242.)

The People ex rel. McMullen, appellants agt. Wm. S. Shephard et al., commissioners, &c., respondents.

Cornelius Vanderzee and another agt. John B. Vanderzee, appl't. (30 Barb. 331.)

Richard P. Bruff, executor, &c., agt. Hippolyte Mali and another, appellants.

Thomas Clark, resp't agt. The Eighth Avenue Railroad Co. (32 Barb. 657.)

The People ex rel. Ernest Fielder, appellants agt. James Mead, Jr., Supervisor, &c.

The New York and N. H. R. R. Co. agt. Ketchum & Bement, survivors of Rogers, impleaded, &c., respondents.

Charles Kelsey, appellant agt. Gamaliel King et al. (32 Barb. 410.)

Henry W. Ward, appellant agt. Elisha Ruckman, respondent. (23 How. 330.)

Michael Fay, respondent agt. George O'Neil, appellant.

Samuel H. Hartshorne, respondent agt. The Union Mutual Insurance Company.

The Mechanics' Bank of the City of New York agt. John Straiton et al. appl'ts.

William M. Mallory, respondent agt. The Tioga R. R. Co. (39 Barb. 488.)

Peter McLaron, appellant agt. Martin McMartin, administrator, &c.

Alexander L. Shaw, appellant agt. William V. Smith, respondent.

Eunice Parker, appellant agt. Porter McCluer, respondent.

George R. Thompson, appellant agt. Moses Chamberlain, respondent.

Loren L. Tompkins, respondent agt. Titus Ives, appellant.

Phineas L. Ely, successor, &c., agt. The Board of Supervisors of Niagara County

Samuel J. Rockwell, by guardian, agt. Gruden H. Brown, appellant.

Decisions Court Appeals.

James F. Main, respondent agt. George W. Niles, appellant ; Same agt. Same.
Serena Ferris, respondent agt. The Union Ferry Company of Brooklyn.
Joseph Barton, respondent agt. The City of Syracuse. (37 Barb. 292).
The Bank of Auburn, respondent agt. Lewis Putnam, President of the Farmers' and Mechanics' Protection Company of Weedsport.
Charles Wall et al., appellants agt. The Home Insurance Company.
Joseph Stringham, appellant agt. The St. Nicholas Insurance Company, resp't.
Hannah Tobias, appellant agt. Ann E. Cohn and another.
The People, &c., plaintiffs in error agt. Henry F. Moring, defendant in error.
Margaret P. Bunn, executrix, &c., respondent agt. Wm. Vaughan, appellant.
Joseph Sanford and wife, respondents agt. Noah Norris, appellant.
Charles A. Gram et al., appellants agt. The Russian Evangelical German Society et al., respondents.

The judgments of the oyer and terminer and of the supreme court reversed, and the conviction being in the opinion of this court legal and regular, the record is remitted to the end that the oyer and terminer of Livingston county sentence the plaintiff in error to suffer death for the crime whereof he stands convicted, and that he be confined at hard labor in the state prison at Auburn, until such punishment of death shall be inflicted.

Robert McKee, plaintiff in error agt. The People, &c., defendants in error.

Order granting new trial affirmed and record remitted.

The People, &c., plaintiffs in error agt. Eliza Bryan, defendant in error.

Judgment affirmed and record remitted, with directions to execute the sentence.

Aaron M. Davis, plaintiff in error agt. The People, &c., defendants in error. (45 Barb. 494.)

Order appealed from reversed, without costs of this appeal to either party.

The People ex rel. Robertson agt. Benjamin Ferris et al., respondents. (41 Barb. 121 ; 28 How. 193 ; 18 Abb. 64.)

Judgments affirmed, with costs, and ten per cent damages.

Laura P. Smith, executrix, &c., agt. Russell Martin et al., administrator, &c.
Mabel Reynolds, respondent agt. Schuyler Reynolds, appellant.
Jerome Phillips, respondent agt. Isaac Cary, appellant.
Samuel W. Wright, respondent agt. Jacob Saunders, appellant.
James H. Case, respondent agt. Hiram G. Hotchkiss.

Order of general term affirmed, and judgment absolute for plaintiff, and supreme court is directed to ascertain the amount due plaintiff, and to render judgment therefor with costs.

Sarah L. Cook, infant, &c., agt. Samuel M. Meeker and Wm. Conselyea, appl'ts. (42 Barb. 533.)

Order appealed from affirmed, with costs.

Alexander S. Diven, receiver, &c., appellants agt. Alfred Lee and Thomas Lee, executors, &c., and another.
The People ex rel. Noell agt. Richard Kingsland, appellant.

Order granting new trial affirmed, and judgment absolute for the defendants, with costs.
Ann Curran, administratrix, &c., agt. The Warren Chemical and Manufacturing Company, respondents.

Judgments reversed, and new trial ordered ; costs to abide the event.

Jarvis N. Lake, appellant agt. The Artisans' Bank. (17 Abb. 232.)

Decisions Court Appeals.

Charles Kelsey, appellant agt. Robert M. Ward et al. (38 Barb. 289; 42 Barb. 582; 16 Abb. 98.)

Abraham B. Van Benthuyssen agt. Milton Sawyer and another, respondents.

The People, &c., agt. Alden Vilas et al., respondents.

Wm. J. Blydenburgh, executor, &c., agt. Horace Thayer, appellant.

Darius Perrin, respondent agt. The New York Central R. R. Co. (40 Barb. 65.)

The Commercial Bank of Clyde, appellant agt. The Marine Bank, respondent.

Samuel H. Smith, respondent agt. Henry L. Babcock, et al.

Wm. A. Husted and another agt. Daniel H. Craig, appellant.

John G. Richtmyer, respondent agt. Benton F. Morse et al., appellants.

Order granting new trial reversed, and judgment on verdict affirmed, with costs.

Abraham X. Parker, trustee, &c., agt. Benjamin F. Jarvis et al., respondents.

Alexander M. Lawrence, respondent agt. Ralph Clark et al., appellants.

Order granting new trial affirmed, and judgment absolute for defendants, with costs.

Allen Comstock, appellant agt. Samuel Ames and another, executors, &c.

Judgment reversed, and judgment for defendants, with costs.

The People ex rel. Peter Cagger, resp't agt. Thomas Dolan et al., assessors, &c.

Order of general term appealed from, reversed, without costs of appeal, either to the general term or to this court, and the order of June term, 1859, should be reversed, and the case sent back in the matter of accounting to the accounting referee, Mr. Parker, unless the plaintiff, within twenty days after the filing of the remittitur from this court, stipulates to remove the amount reported against the assignees, Morton & Gaylord, to the sum of \$1,127.80; and in case such stipulation is given, then the said order of said special term is affirmed for the above mentioned sum, with interest from the date of the report.

Charles B. Colburn, appellant agt. Horace Gaylord, impleaded, &c.

Judgment affirmed, with costs, and motion to dismiss appeals from three; order granted, with costs.

Richard M. Hoe and another agt. Jesse K. Sanborn, appellant. (24 How. 26.)

Order granting new trial reversed, and judgment of special term affirmed, with costs.

The Northwestern Insurance Company agt. Marshall W. Forward et al., resp'ts.

Frederick F. Thompson, appellant agt. Jane Litchfield and another, respondents.

Judgment affirmed, with costs and five per cent damages.

Charles H. Van Deusen, receiver, &c., agt. Daniel Worrell, appellant.

Harvey F. Auberry, respondent agt. Josiah M. Fiske, appellant.

Order granting new trial reversed, and judgment on report of referee affirmed, with costs.

John B. Trevor and another, appellants agt. John Wood et al., respondents.

Henry W. Rosebrook, appellant agt. William R. Densmore, president, &c.

Judgment reversed, and judgment of special term of May 3d, 1862, affirmed, with costs.

Moses Chamberlain, appellant agt. Jane K. Dempsey, impleaded, &c. (23 How. 356; 15 Abb. 1.)

Writ of Error dismissed, with costs.

James G. King and another, pl'ffs in error agt. The Mayor, &c., def'ts in error.

Judgment reversed, and judgment on verdict for plaintiff, with costs.

George H. Cisco, appellant agt. Marshall O. Roberts, respondent.

Judgment reversed, and new trial ordered on plaintiff's appeal; costs to abide the event. The defendant's appeal dismissed, with costs.

Calvin Day et al. appellants agt. Thomas P. Saunders, respondent.

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Ex. 7. 1. 1. 0

HARVARD L

